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George Kannar, *Citizenship and Scholarship (review essay)*, 90 Colum. L. Rev. 2017 (1990).

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BOOK REVIEW ESSAY

CITIZENSHIP AND SCHOLARSHIP

THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW. By Robert H. Bork. New York: The Free Press, 1990. Pp. xiv, 432. \$22.50.

BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA. By Ethan Bronner. New York: W.W. Norton & Co., 1989. Pp. 399. \$22.50.

THE PEOPLE RISING: THE CAMPAIGN AGAINST THE BORK NOMINATION. By Michael Pertschuk & Wendy Schaetzel. New York: Thunder's Mouth Press, 1989. Pp. xi, 317. \$13.95.

NINTH JUSTICE: THE BATTLE FOR BORK. By Patrick B. McGuigan & Dawn M. Weyrich. Washington, D.C.: Free Congress Research and Education Foundation, 1990. Pp. xxi, 306. \$21.95.

*Reviewed by George Kannar**

INTRODUCTION: AFTER THAT FALL

In the autumn of 1987, the United States Senate rejected Robert Bork's Supreme Court nomination by the largest margin in American history. In the early winter of 1988, Anthony M. Kennedy received the same body's unanimous support. Yet three years later, Bork is still the focus of more attention on the part of legal intellectuals than Kennedy may ever be. Since his confirmation, the seemingly forgotten Justice from Sacramento—never part of East Coast political, journalistic, or academic circles—has cast his powerful vote against affirmative action,¹ abortion rights,² the rights of criminal defendants,³ and vigorous en-

* Associate Professor, SUNY-Buffalo School of Law. Thanks are owed to Dawn Baksh, Dianne Avery, Guyora Binder, Alan Freeman, Jeffrey N. Gordon, Fred Konefsky, Betty Mensch, Aviam Soifer, Robert Steinfeld, and especially to Ellen V. Weissman for their assistance in the preparation of this essay. Indispensable research assistance was provided by Sara Faherty, Jonathan G. Hager, and Oren L. Zeve.

1. *Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997, 3044 (1990) (Kennedy among dissenters from decision affirming FCC's minority preference policies); *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706, 734 (1989) (Kennedy, in majority, joining opinion striking down minority set-aside program).

2. *Webster v. Reproductive Health Servs.*, 109 S. Ct. 3040, 3046–58 (1989) (supporting state restriction on abortion access).

3. *Maryland v. Craig*, 110 S. Ct. 3157, 3157–71 (1990) (upholding use of closed-circuit television testimony against confrontation clause challenge in child molestation

forcement of civil rights⁴ and employment discrimination laws.⁵ But until Justice Brennan's resignation suddenly forced them to assess the current Court more systematically, scholars and national opinion makers wrote very little about the meaning of Justice Kennedy's confirmation. For three years, they flooded the world instead with lectures, articles, and books about what Robert Bork's rejection meant.⁶ The stars that guide our politics and our constitutional theory, fleetingly aligned in the summer and fall of 1987, quickly resumed their customary distance. And the almost total silence with which legal scholars greeted David Souter's nomination only makes the Bork Affair look all the more anomalous.

So far there have been two waves of Bork Affair analyses—articles and lectures produced during the Affair or in its immediate aftermath, and now a round of more complete accounts and self-justifications. Common themes pervade them all. Bork's supporters and opponents seem easily to have reached consensus concerning the "Questions Presented" by the Affair. Was Originalism rejected, they repeatedly inquire, or the idea of unenumerated rights confirmed? Did Bork's opponents impermissibly politicize the Supreme Court confirmation

case); *Arizona v. Youngblood*, 109 S. Ct. 333, 334–38 (1988), reh'g denied, 109 S. Ct. 885 (1989) (refusing to reverse conviction for state's inadvertent failure to preserve potentially useful evidence); see also *Michigan Dep't of State Police v. Sitz*, 110 S. Ct. 2481, 2483–88 (1990) (upholding police sobriety checkpoints).

4. *Patterson v. McLean Credit Union*, 109 S. Ct. 2363, 2372–75 (1989) (narrowly construing 42 U.S.C. § 1981 (1982) in racial harassment case).

5. *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115, 2121–24 (1989) (rejecting use of statistical evidence to establish prima facie case in discrimination matter).

6. In the law reviews alone, more than one hundred articles have been published discussing the Bork appointment controversy. A full listing of them would therefore be impossible. Among the most significant are *Essays on the Supreme Court Appointment Process*, 101 *Harv. L. Rev.* 1146 (1988) (contributions by Freund, Ackerman, Carter, Monaghan, and Totenberg); Ginsburg, *Confirming Supreme Court Justices: Thoughts on the Second Opinion Rendered by the Senate*, 1988 *U. Ill. L. Rev.* 101 (1988); Horwitz, *The Meaning of the Bork Nomination in American Constitutional History*, 50 *U. Pitt. L. Rev.* 655 (1989); Tushnet, *Principles, Politics, and Constitutional Law*, 88 *Mich. L. Rev.* 49 (1989); Yackle, *Choosing Judges the Democratic Way*, 69 *B.U.L. Rev.* 273 (1989). A special issue of the *Cardozo Law Review*, *The Bork Nomination*, 9 *Cardozo L. Rev.* 1 (1987), contains a number of short comments from legal scholars concerning the Bork controversy and helpfully reprints a number of the interest group and government reports reviewing Bork's record issued while his nomination was pending. In addition to Professor Yackle's article, three others are of particular relevance to the points at issue here. See Myers, *The Role of Special Interest Groups in the Supreme Court Nomination of Robert Bork*, 17 *Hastings Const. L.Q.* 399 (1990); Ross, *Participation by the Public in the Federal Judicial Selection Process*, 43 *Vand. L. Rev.* 1 (1990); and White, Chief Justice Marshall, Justice Holmes, and the Discourse of Constitutional Adjudication, 30 *Wm. & Mary L. Rev.* 131 (1988). To date, only one law review article concerning Justice Kennedy has appeared. Comment, *Justice Anthony M. Kennedy: Will his Appointment to the United States Supreme Court Have an Impact on Employment Discrimination?*, 57 *U. Cin. L. Rev.* 1037 (1989).

process? And, of course, the question argued most extensively and bitterly: Did Bork's opponents lie?

Bork's opponents and supporters also largely share a common version of the Affair's essential narrative, or at least the same assessment of its outcome. Neither side seems to see the Bork Affair as anything but a major liberal victory. Bork's self-congratulatory opponents describe his defeat as a "failed constitutional moment," an unsuccessful right-wing attempt at a "transformative appointment."⁷ His supporters denounce the campaign against him as the triumph of a "lynch mob,"⁸ led by "the vicious civil rights industry,"⁹ in which "the Communists played an important role."¹⁰ Were such post-hoc rhetoric the only history available, one would scarce remember that the Senate had unanimously confirmed the "more conservative"¹¹ Antonin Scalia to the Court a year before rejecting Bork and that it had confirmed Anthony M. Kennedy, without dissent, just a few months later.

The more time that passes, the more that both the gloating and the bitterness seem excessive. As at least some astute conservatives perceived at once,¹² at a practical level Bork's opponents only won the confirmation battle in the terms in which they had framed it. Three years later, it is now apparent that the anti-Bork campaign only protected us against results that never really were a danger: that poll taxes and literacy tests might be reinstated, that mandatory sterilization might widely be imposed, that states might pass new laws banning married couples' use of contraceptives. Aside from the protection of expressive flag-burning (a right that panicked liberals soon tried to give away by statute anyway), it is far from obvious what the substitution of Kennedy for Bork actually has meant to the people of the country. Consequently, those to whom the Bork Affair still matters may only be

7. Ackerman, *Transformative Appointments*, 101 Harv. L. Rev. 1164, 1178 (1988).

8. M. Pertschuk & W. Schaetzel, *The People Rising: The Campaign Against the Bork Nomination* 9 (1989) [hereinafter *The People Rising*] (quoting Ronald Reagan, Oct. 8, 1987); see also P. McGuigan & D. Weyrich, *Ninth Justice: The Fight for Bork* 182 (1990) [hereinafter *Ninth Justice*] (also quoting Reagan).

9. *Ninth Justice*, supra note 8, at 176 (quoting James McClellan).

10. *The People Rising*, supra note 8, at 9 (quoting Reed Irvine, *Accuracy in Media*). Even Irvine's somewhat anachronistic red-baiting is mild, however, compared to the rhetoric of Howard Phillips, who claimed the anti-Bork campaign was run by "big-profit pornographers, the multimillion dollar abortionists, and the others who had a selfish, pocketbook interest in financing the unprincipled campaign . . ." *Ninth Justice*, supra note 8, at 184.

11. *The White House Report: Information on Judge Bork's Qualifications, Judicial Record & Related Subjects*, reprinted (as abridged) in 9 Cardozo L. Rev. 187, 188 (1987).

12. See, e.g., *Ninth Justice*, supra note 8, at xv-xvi ("If Robert Bork was the perfect, Anthony Kennedy was the good."). However, not all those who perceived Kennedy's true significance were of the Right. Professor Alan Dershowitz, for one, noted at the time of Kennedy's appointment that he "votes like Judge Robert Bork and writes like Lewis F. Powell, Jr." *Id.* at xv.

the same traditional “insiders”—the scholars, Senators, lawyers, and professional politician-activists—who have been heavily involved in such matters all along.

This is not surprising. Despite all the overtones of Armageddon, at its heart the Bork Affair was not a struggle about preserving specific outcomes for the public as a whole; it was a struggle among elites to secure popular legitimation or delegitimation of each others' views. Taking the Affair at this ideological and symbolic level, there can be no doubt that the liberals did emerge victorious, in the process dealing something of a death blow to any simple-minded version of intellectual “neutrality.” In the ever-growing literature on the Affair, each side continues to accuse the other of having been excessively “result-oriented.” But the truth may be that neither was: a result-oriented Left would have opposed Kennedy just as vigorously as Bork; a result-oriented Right would by now have stopped complaining.

In the current round of post-mortems of the Bork Affair, arguments concerning the correct relationship between politics and constitutional ideas have become hopelessly entangled with arguments about what shall be considered proper politics. It helps little in untangling these arguments that all concerned express their views in terms of the same Edenic myth—the sense, conveyed in the subtitle of Bork's current book,¹³ of a falling away from some prior state of innocence. For Bork's supporters, the Fall involves a departure from the “original” conception of what constitutional courts should do, with law becoming now just another form of politics, part of America's larger decline from a bygone age of social discipline. For his opponents, the Fall concerns the effort to preserve the legacy of a Warren-dominated Golden Age, in which equality and liberty were actively advanced by nine men cloaked in robes. For concerned observers of the confirmation process, the same nostalgic metaphor has resonance as well: it represents, for them, the breaching of a perceived taboo against interesting the democratic masses too directly in composing their countermajoritarian institution.

But the Bork Affair also represents another Fall: a brief descent by constitutional scholars and other law professors from the airy realms of critique and theory to the unruly world of popular campaign and legislative politics, so often driven by the polls and organized “special interests.” In 1987, the Bork Affair presented legal scholars—and indeed it still presents them—with the question of how people with precisely evolved ideas about constitutional adjudication should confront the pressures for compromise, oversimplification, and distortion that reside in the concrete world of media-oriented democratic politics. Confronting this question is not made simpler by the fact that the unstructured and highly competitive political world also is one in which

13. R. Bork, *The Tempting of America: The Political Seduction of the Law* (1990) [hereinafter *The Tempting of America*].

momentary passions, or a mistaken sense of *realpolitik*, will sometimes overwhelm even the most principled participant's commitment to abstract, long-term values. And the fact that effective political participation will often require becoming part of wider coalitions only complicates matters further. Such coalition efforts inevitably mean that scholarly participants in democratic politics will sometimes find themselves implicated in tactics and maneuvers they would not themselves have chosen.

Most previous discussions of the Bork Affair have been phrased in terms of possible distortions of Bork's record, and of the confirmation process. But in the longer run a different question about the fall of 1987 may be more apt: having shown, perhaps, excessive animus on the Bork occasion, did the scholars show too much self-restraint in the case of Kennedy? Since Bork was defeated, most progressive legal scholars—uncomfortable in this area in the first place, and made still more so by the Affair's unrestrained contentiousness—have withdrawn to safer, more familiar ground. At this higher level, such unpleasant questions are transformed, and loftier tones assumed. Visions of "civic virtue" resume their law review "revival,"¹⁴ as legal academics propound rediscovered "republican" ideas, designed to advance an idealized notion of "deliberative discourse" in our politics. Yet troubling questions of a more practical nature remain not only unanswered but unasked with regard to the legal academy's conduct during the Bork Affair. Is it socially responsible—does it show an appropriate degree of moral and political self-consciousness—to boast so loudly over having won the legitimization battle when so little actually was accomplished in terms of constitutional results? And such unpleasant questions have become only more poignant lately, as the Washington insiders themselves have struggled to explain why David Souter should have been pressed hard to explain his views on specific issues—after Anthony M.

14. This mid-1980s development, a reaction by legal academics to the degraded nature of current American politics, seeks to elevate the level of public discourse and to promote a renewed sense of "civic virtue" among the citizenry—creating a political culture oriented more toward a shared vision of the American "common interest" than constituency-oriented "special" interests. See generally Symposium: The Republican Civic Tradition, 97 *Yale L.J.* 1493 (1988) (summarizing basic "republican" views, and collecting citations to other "republican" articles). The premise here is that these are noble goals, even though, as many have noted, see *id.*, the contemporary "republicans" seem to have focussed much more attention than is warranted upon the courts as a possible agent of this very fundamental change. They may also have placed much heavier emphasis than their ideals require on the alleged continuity between their goals and the "civic republican" strain in American history. See Mensch & Freeman, *A Republican Agenda for a Hobbesian America?*, 41 *U. Fla. L. Rev.* 581 (1989) (disputing contemporary "republicans'" historical claims). This Essay proceeds on the assumption that the contemporary "republicans" nonetheless have sufficiently desirable objectives that the attainability of their goals deserves to be assessed soberly. But see Fallon, *What is Republicanism and is it Worth Reviving?*, 102 *Harv. L. Rev.* 1695, 1715–20 (1989) (doubting worth of the new "republicanism," even as an "ideal type").

Kennedy was not.¹⁵

Having condoned or participated in the effort to convince millions of ordinary Americans that the defeat of Judge Bork would matter to their lives, Bork's opponents may also have incurred an obligation, completely unperformed,¹⁶ to oppose Judge Kennedy's nomination too—or at least an obligation to make clear what Kennedy's nomination effectively would mean. Accused so bitterly of having violated basic standards of decorum and truthfulness in their campaign against Bork, Bork's opponents inside the legal academy, in particular, may actually have been guilty of something even worse: pretending to be result-oriented when in fact they were not; helping to make the American people believe that the Bork debate was substantive when all they personally cared about was ideology and theory.

Now that the Affair is over, the time seems ripe to ask whether what the scholars did—or did not do—during the fall of 1987 fulfilled the responsibilities implicit in the privileged position that they occupy with respect to constitutional politics. As the progressive scholarly community becomes ever more closely associated with outside political causes and particular political organizations, the Bork Affair places in high re-

15. Indeed, the scramble to explain away the silence that surrounded the nomination of Judge Kennedy began only hours after Justice Brennan submitted his resignation. According to one source, Kennedy was different because his nomination occurred before “the Supreme Court politicized the abortion issue” in 1989, even though strong arguments could be made that nominations occurring before the issue was “politicized” should have mattered more, not less. Marcus, *Caution Urged on Nomination: Bush Warned to Avoid Abortion ‘Litmus Test’ in Choice For Court*, Wash. Post, July 23, 1990, at A1, A7, col. 5 (quoting Faye Wattleton of Planned Parenthood). The first instinct of others, apparently, was to invoke old-fashioned obfuscation: “We cannot accept another Anthony Kennedy whose views seemed to be unclear and therefore was not adjudged to be someone who could be questioned” about his attitude toward *Roe*,” another source said, even though such arguments present little basis for distinguishing between a Kennedy and, for example, a David Souter. Devroy & Marcus, *Fast Action Vowed On Court Nominee*, Wash. Post, July 22, 1990, at A1, A12, col. 1 (quoting Kate Michelman, executive director of the National Abortion Rights Action League). See generally Greenhouse, *Opponents Find Judge Souter Is Hard Choice to Oppose*, N.Y. Times, Sept. 9, 1990, at E4, col. 5 (Bork opponents, exhausted by the Bork Affair, accepted vague answers from Kennedy, placing them in difficult position regarding their demands for more definite responses from subsequent nominee).

16. In all, eighteen legal academics appeared before the Judiciary Committee to testify against Bork; twenty-three testified in favor. *Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary, 100th Cong., 1st Sess. (1987)* [hereinafter *Bork Hearings*]. At Justice Kennedy's hearings, six legal academics testified in favor of confirmation; one testified in opposition, but only as a representative of an interest group, not as an allegedly “independent” professor. *Nomination of Anthony M. Kennedy to be Associate Justice of the Supreme Court of the United States: Hearings Before the United States Senate Comm. on the Judiciary, 100th Cong., 1st Sess. (1987)* [hereinafter *Kennedy Hearings*]. Professor Laurence Tribe testified against Bork's confirmation, *Bork Hearings*, supra, at 1267–1334, and in favor of Kennedy's. *Kennedy Hearings*, supra, at 300–51.

lief whether Alexander Bickel's famed distinction between "the ways of the scholar" and the ways of the ugly world still can be maintained.¹⁷ It invites us to consider whether the current generation of academic lawyers performed its own "republican" function in a seemly manner when something of real consequence was thought to be at stake. More importantly, it may also contain lessons—or at least questions—for the future.

For would-be "republicans" among the academic lawyers, facing up to the Bork Affair means thinking about two separate, but deeply intermingled issues if their newly rediscovered ideology is ever to move beyond "the question of governing ideals."¹⁸ They first must take account of the fact that the prevailing modes of constitutional discourse in academic circles must be adapted to suit the popular political context in which, thanks to a conservative Court, more and more future constitutional debates are likely to occur.¹⁹ Secondly, legal scholars who wish to be actively involved in constitutional politics will also need to consider more thoughtfully their own sense of personal and collective "civic virtue," to develop a clearer sense of the values, roles, and scholarly identity appropriate to this new era. How the scholars should structure their relations with the professional interest groups and politicians, who always seem to take the lead in framing mass constitutional disputes, must be given particular attention.

Fortunately, four new books bring the Bork Affair back vividly. If Robert Bork's career highlights all the practical tensions between a life of scholarship and a life of activism,²⁰ *The Tempting of America* highlights all the social, political, and moral ones. To appreciate the quandaries latent in the academic lawyers' situation, and the intractable difficulties involved in constructing a popular constitutional vocabulary without compromising scholarly standards of intellectual integrity, there is no better place to start. Nor is there any clearer evidence that the difficulties involved in constructing a "republican" constitutional vernacular, and in defining the legal scholar's appropriate relationship to the politicians and the interest groups, extend all across the political spectrum.

I. THE MAN WHO WROTE TOO MUCH

From the beginning, Bork's problems arose from precisely the same conflict that later was to trouble his opponents. To argue for his

17. A. Bickel, *The Least Dangerous Branch* 25–26 (1986) (praising "the leisure, the training, and the insulation" that provide the opportunity "to appeal to men's better natures, to call forth their aspirations, which may have been forgotten in the moment's hue and cry").

18. Sunstein, *Beyond the Republican Revival*, 97 *Yale L.J.* 1539, 1589 (1988).

19. See Brest, *Further Beyond the Republican Revival: Toward Radical Republicanism*, 97 *Yale L.J.* 1628, 1630 (1988) ("Different modes of discourse—even constitutional discourse—may be appropriate to different institutions.").

20. Ackerman, *supra* note 7, at 1164–70.

views and to advance his personal ambitions, Bork needed to address two different audiences: a scholarly one to establish his credentials, and at least a limited political one to capture the attention of the Right and of the President. He thus secured his Supreme Court nomination precisely by riding the tiger of high-profile public service, media publicity, and political advocacy. But if such activities brought him to the courthouse door, he was also risking all along that he might be penalized at some later stage for what he had written in scholarly and nonacademic publications, and for what he had said on the lecture circuit. Afterward, Bork's supporters and nonsupporters alike have recognized and lamented one potential lesson of his experience, perhaps already evident in the selection of David Souter for a High Court seat—that the Bork Affair might have a chilling effect on the public service activities of legal scholars and on the provocative expression of controversial views.²¹ Whether other scholars will be chilled may be open to some doubt, but it now is clear from Bork's postrejection tract, *The Tempting of America*, that there was never any serious risk of inhibiting the person Ethan Bronner labels a congenital "man of war."²² Given to strong statements of his views regardless of the different "isms" to which he adhered over time, if Bork experienced a leftward "confirmation conversion" at his hearings, he has now returned to a pure version of the originalist faith.²³

Because of its wide audience, *The Tempting of America* is undeniably an important book, but its importance does not mean it is a very serious one. Frankly conceived as a big-money best-seller (and surely the only book on constitutional theory ever to feature its author's picture on the cover), it is exceptionally disorganized, repetitious, and ill-tempered. Parts of it appear to consist of set-pieces from the neoconservative lecture circuit only minimally adapted to suit their present purpose.²⁴ Routinely representing tolerance of some behavior as its endorsement, taking libertarianism for libertinism at every turn, *The Tempting of America* leaps from analyses of particular constitutional thinkers to broad denunciations of an amorphous "moral relativism," passing

21. See *The Tempting of America*, supra note 13, at 131; Ackerman, supra note 7, at 1183 (Bork "cursed" by his "paper record" and "superqualification"); Cohen, No Paper Trail, Wash. Post, July 26, 1990, at A27 (negative precedent of Bork's provocative writings in the appointment process "guaranteed" Souter's nomination). But cf. Ross, The Functions, Roles, and Duties of the Senate in the Supreme Court Appointment Process, 28 Wm. & Mary L. Rev. 633, 647 n.77 (1987) ("[R]elatively few Supreme Court nominees have been distinguished authors.").

22. E. Bronner, Battle for Justice: How the Bork Nomination Shook America 56 (1989) [hereinafter *Battle for Justice*].

23. *Id.* at 58–77 (noting Bork's previous conversions from socialism to libertarianism to social conservatism).

24. In his discussion of Bork's postrejection career, Bronner mentions some strikingly similar, indeed virtually identical, language to that appearing in *The Tempting of America* in certain post-Affair Bork speeches. *Id.* at 341–42.

seamlessly from discussions of grand theories of constitutional interpretation to broadsides against the specific policy positions and litigation strategies of the ever-unpopular American Civil Liberties Union.²⁵

In addition to providing Bork's version of the events surrounding his nomination,²⁶ *The Tempting of America* attempts to take constitutional argument to the broader populace, to discredit the scholarly views of those who opposed him, and to vindicate what Bork calls the philosophy of "original understanding." The first goal is admirable, the second understandable, and the third so poorly executed that it seems only to shed more doubt upon the worth of the "original understanding" theory and the bona fides of its would-be vindicator. Its argument aside, the sharpness of *The Tempting of America's* rhetoric raises anew all of the old questions about its author's temperament and judgment. Yet *The Tempting of America* does accomplish one thing: it permanently sets to rest the notion that Robert Bork is any kind of moderate. In his view, it now emerges, even Justices Rehnquist and Scalia have been too quick to "assume[] an illegitimate power" and have failed to defend sufficiently against the "political seduction of the law."²⁷ To any objective reader, *The Tempting of America* makes clear that Bork is not just "outside the mainstream," as was charged. He is outside the entire river basin.

To call *The Tempting of America* a "tract" is to use the term with some precision. According to Bork himself, *The Tempting of America* is a pamphlet in a "cultural war" between right-thinking Americans and a conspiratorial "liberal elite," out to impose a "kind of restless and unprogrammatic radicalism" on our country through manipulation of the courts.²⁸ When it comes to the Constitution, Bork's world is strictly

25. See, e.g., *The Tempting of America*, supra note 13, at 241–50.

26. See id. at 268–336. Bork's self-defense is remarkably ineffectual. Labelling the campaign "relentlessly disingenuous," id. at 323, he frequently responds to versions of the charges that are somewhat of his own creation. In answering the claim in an advertisement featuring Gregory Peck that he had "defended" poll taxes, Bork transforms the charge into a claim that he had "favored" them and in the course of beating this straw man, essentially confesses to the charge. Id. at 324–26; see also infra note 132 (describing the Peck commercial). On women's issues, Bork makes strong arguments against some charges (most notably the controversial sterilization matter), and repeats his arguments about the value of his still-confusing "reasonableness" standard. Id. at 326–31. He neglects to mention, however, that he had opposed the Equal Rights Amendment, which would have eliminated any originalist objection to strongly protecting women's rights through the fourteenth amendment. With respect to what he calls "[t]he charges that I was opposed to freedom of speech," he defends his 1971 article with the reasonable assertion that it was "speculative" on its face. Repeating that he has long since backed away from the assertion that the first amendment protects only political speech, he makes clear that he only did so because he could not develop a workable rule through which to enforce it. Id. at 333–36. With evident heart-felt pain, and greater success, he rebuts any suggestion of racism with specific facts and figures concerning his role in race cases while he was Solicitor General. Id. at 324–26.

27. Id. at 240.

28. Id. at 10.

Manichaeism. "There are only two sides," he says. "Either the Constitution and statutes are law, which means their principles are known and control judges, or they are malleable texts that judges may rewrite to see that particular groups or political causes win."²⁹ *The Tempting of America* is a declaration of *jihad*, intended in so many words to "root out" and destroy any and all such "heresy."³⁰

Much has already been said and written, in law reviews and elsewhere, about the flaws in Bork's originalism as set forth in *The Tempting of America*.³¹ But the most striking fact about the book is how little of that is necessary. Precisely because *The Tempting of America* is so thoroughly oblivious to actual constitutional history, it provides an exceptionally pure case study of an attempt to argue constitutional issues to a mass, nonexpert audience. Yet even someone without extensive specialized training, or any expertise in history, should quickly realize that Bork accomplishes the same feat in this book that he did with respect to his nomination in his hearings before the Senate. In *The Tempting of America* Bork does what he has always done. He has said too much, and too outrageously, and he has ended by wounding himself more than anybody else.

His troubles begin not in *The Tempting of America*'s contents, but in its very title. While sarcastically denouncing left-wing villains for their excessive investment in "utopian speculation concerning an impossible Eden,"³² Bork unselfconsciously entitles the first section of his book "Creation and Fall." But his argumentative history of the decline of "orthodoxy" quickly encounters serious problems: it soon becomes clear that the "heresy" Bork attacks has as venerable a history as his "orthodoxy" does. Even as he introduces the "original understanding" concept, for example, Bork cannot help admitting that "[the principles] the ratifiers understood themselves to be enacting" differ depending upon which ratifiers' opinions are consulted.³³ And though he uses this conclusion merely to distinguish his position, based on the eighteenth-century public's "understanding" from positions based upon the ratifiers' own "intent," he must still leave his readers wondering how the

29. Id. at 2.

30. Id. at 11.

31. As Leonard Levy and others have pointed out, Bork "as a historian, is functionally illiterate." Levy, *The Right is Wrong on Rights*, 18 *Reviews in Amer. History* 284, 289 (1990) (also noting Bork's Manichean outlook); see also Ackerman, *Robert Bork's Grand Inquisition* (Book Review), 99 *Yale L.J.* 1419, 1420 (1990) (Bork's vision is "radically ahistorical"); Sager, *Back to Bork*, *N.Y. Rev. Books*, Oct. 25, 1990, at 23, 24 (noting obvious contradictions in Bork's positions); Note, *The Priest Who Kept His Faith But Lost His Job*, 103 *Harv. L. Rev.* 2074, 2078 (1990) (noting, as here, Bork's inconsistency regarding popular democracy).

32. *The Tempting of America*, supra note 13, at 207 (discussing Duncan Kennedy).

33. Id. at 144. The biggest problem for Bork's historicist version of originalism of course concerns whether the Framers themselves thought that "originalism" was the correct way of interpreting the Constitution. See Powell, *The Original Understanding of Original Intent*, 98 *Harv. L. Rev.* 885, 944-48 (1985) (arguing that they did not).

general public's "understanding" is to be discerned, if even the ratifiers' own cannot. Moreover, as Bork continues, history, common sense, and a desire not to give evidence of extremism repeatedly require him to carve excusable exceptions from what he claims is orthodox.

Even our most honored constitutional adjudicators, it inevitably develops, have dabbled (if not more than that) in what Bork would characterize as unorthodox behavior: John Marshall, Bork concedes, "repeatedly ignored the actual legal materials before him in order to make points he thought important."³⁴ Yet a desire to seem reasonable forces the conflicted Bork to find Marshall both a "great judge"³⁵ and a bad contemporary "model."³⁶ By the time of the *Legal Tender* cases,³⁷ Bork's dilemma worsens: Chief Justice Chase's opinion there, he says, "would be an incredible performance had we not seen its like so many times since,"³⁸ which is the same as saying that the "heresy" has roots older than a century. Later, acknowledging resignedly that the Court "could not stand . . . against the large majorities that . . . opposed its work"³⁹ in the early New Deal era, Bork disparagingly attributes the Thirties' Court's change of direction to shifts in "political and intellectual fashion,"⁴⁰ a view that, but for its tone, would not seem too far removed from the more progressive analysis of someone like Professor Ackerman.⁴¹ Bork's disparaging tone is, moreover, almost entirely gratuitous. He plainly is not eager to spend much time, or credibility, denouncing the Court's decisions upholding the New Deal.

But later developments create *The Tempting of America's* biggest problems. The despised Warren Court, whose perceived excesses Bork traces to the Legal Realists, simply tangles him in knots. In view of the purported populist/democratic basis for Bork's opposition to activist review, what he actually charges the Warren Court with seems extremely curious. The Warren Court's offense, he says, was to make overly clear to ordinary citizens that which Bork acknowledges first-year law students learn upon confronting the average case-book: "that much of constitutional law has in fact been politics."⁴² Then, admitting that it is "somewhat unclear whether the modern Court is more politicized than Courts of previous eras,"⁴³ Bork is suddenly required to confess that what he has been asserting to be the accepted "ortho-

34. *The Tempting of America*, supra note 13, at 26-27.

35. *Id.* at 27.

36. *Id.* at 28.

37. 79 U.S. (12 Wall) 457 (1871).

38. *The Tempting of America*, supra note 13, at 35.

39. *Id.* at 51.

40. *Id.*

41. See, e.g., Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 Yale L.J. 1013 (1984).

42. *The Tempting of America*, supra note 13, at 71.

43. *Id.* at 129.

doxy" for some 130 pages has never really prevailed in the actual judicial world. We discover instead, and decidedly abruptly, that his view of the Constitution is "normative" rather than "descriptive"⁴⁴—that Robert Bork, as much as his left-wing adversaries, is seeking not a real-world restoration but "an impossible Eden" of his own.

As the difference between Bork and his opponents thus suddenly reduces to a choice between competing Edenic visions, *The Tempting of America* also ends up making Bork's opponents come off looking better than he does. Even by Bork's own account, his opponents have at least been candid, acknowledging from the beginning that there is a difference between the Millennium and the Garden. For all its harsh assertiveness, Bork's "originalist" historical account contains just enough concessions—the propriety of *Brown v. Board of Education*,⁴⁵ that Marshall was a "great judge," that constitutional law has always been "political"—to implicate him in the "heresy" too. "The denial of a scheme wholesale is not heresy," Bork believes; "the essence of heresy [is] that it leaves standing a great part of the structure it attacks."⁴⁶ But to construe his own arguments strictly would require consigning Bork himself to the fire and the stake.

Nor do things improve for Bork when he turns from legal history to legal theory. When, in the middle section of the book, Bork proceeds to analyze the works of the contemporary "heretics," his combative instincts promptly get him into trouble once again. He notes rightly that in the work of many contemporary liberal theorists, the "concepts are abstruse, . . . their arguments convoluted, and their prose necessarily complex,"⁴⁷ not to mention, as he sees it, their "relativistic" world view morally and politically noxious. Bork says he hopes that *The Tempting of America* will ignite a widespread public "reaction of ridicule and hostility that might have been expected"⁴⁸ but for this "largely unread"⁴⁹ literature's "inaccessibility."⁵⁰ Having said this, however, he sets himself up for some serious political trouble. If this obscure and elitist literature is so inaccessible, Bork makes it harder for himself to demonstrate why it is as powerful as he claims.

His explanation, which emerges in perhaps *The Tempting of America*'s most intriguing passages, depends upon both a highly concrete conception of the role of ideas in American society, and several

44. Id. at 155.

45. 347 U.S. 483 (1954); see *The Tempting of America*, supra note 13, at 74–83. Bork's tolerance does not extend to *Bolling v. Sharpe*, 347 U.S. 497 (1954), however, which he still sees as "a clear rewriting of the Constitution." *The Tempting of America*, supra note 13, at 83–84.

46. *The Tempting of America*, supra note 13, at 11 (quoting H. Belloc, *The Great Heresies* 12 (Trinity Communications ed. 1987)).

47. Id. at 134.

48. Id. at 135.

49. Id. at 134.

50. Id. at 135.

dubious assumptions concerning the quality of America's judges and the social influence of the contemporary legal academy. A great fan of Whittaker Chambers's *Witness*,⁵¹ Bork partially recreates the atmosphere of that brilliant, conspiratorially minded classic. He is not worried, it turns out, about these theorists' ability to convince the people as a whole of the value of their views; he is worried about "infiltrat[ion]"⁵² by those who would "convert the Constitution from law to politics"⁵³ by preying on the young and under-vigilant. He warns that these subversions will come about in two ways. First, the very fact that these alternative theories are so prevalent behind the ivy walls will convince law students and judges that the "traditional" theories must be outmoded, even if the students and judges are unable to read or understand what the new theories say.⁵⁴ Even unread, therefore, the new theories nonetheless will serve to destabilize the legal culture, opening the way for long-term degeneration, as New Age-educated law clerks take over more and more constitutional opinion-writing from their intellectually intimidated judges.

In addition, Bork contends, other social forces will meanwhile help ensure more directly that as the academy goes, so will the judiciary. Since judges are "by definition members of the intellectual class,"⁵⁵ Bork says, they are directly vulnerable to the elitist infections and general "attitudes" of that class,⁵⁶ especially since, in Bork's view, a large number of our judges lack the mental discipline their job requires.⁵⁷ But in an unguarded quip, reported by Ethan Bronner,⁵⁸ Bork himself has already noted pointedly what is wrong with his own argument. Contemporary constitutional theory (and, with it, legal education) may have been "ruined," Bork joked, not because the academy was infiltrated by left-wing cultural "subversives," but because President Reagan made all the right-wing theorists into judges. If these liberal theorists be heretics, especially after the departure of Justice Brennan, they are likely to be heretics crying in the wilderness for quite some time to come.

It is with this middle section of *The Tempting of America* that Bork

51. See *Battle for Justice*, supra note 22, at 94; An Interview with Robert Bork, *The Conservative Digest*, Oct. 1985, reprinted in *Ninth Justice*, supra note 8, at 300.

52. *The Tempting of America*, supra note 13, at 246.

53. *Id.* at 136.

54. But see Carter, *The Confirmation Mess*, 101 *Harv. L. Rev.* 1185, 1185 (1988) ("the courts that must do the serious work of interpreting the Constitution show no serious interest in any" of the academic theories that "[are] seen as finally [un]workable [and] contingent and internally chaotic").

55. *The Tempting of America*, supra note 13, at 8; accord *id.* at 241.

56. *Id.* at 135.

57. *Id.* at 136 ("Too often the judge is not conscious of the organizing principles that guide him, which means that he is likely to be led to a decision by sentiment rather than reason.").

58. *Battle for Justice*, supra note 22, at 47.

presumably means to carve his niche as the legal profession's Allan Bloom.⁵⁹ Demonstrating again the ironic convergence between Right and Left that increasingly characterizes current political discourse,⁶⁰ Bork, like many Critical Legal scholars, "trashes" everyone around, seeming to believe that "unmasking" the fact that some other constitutional theory has limitations or internal contradictions suffices to discredit it. Moreover, his treatment of these theoretical controversies also raises obvious questions of even-handedness. After articulating his own version of the "original understanding," for example, Bork conspicuously declines to subject to similar close scrutiny the work of others (like Lino Graglia and Raoul Berger) who, he says, also "take the traditional position that the original understanding controls,"⁶¹ suggesting to the public that the "original understanding" theory is more coherent—and its implications less socially controversial—than it actually is.

Considering that *The Tempting of America* is intended for a general audience, it is particularly odd that Edwin Meese, surely the country's best-known originalist, is not even mentioned until page 313, and then only once, in the context of his having been Attorney General during the confirmation struggle.⁶² Many of Bork's readers may wonder whether there is not some ulterior reason why he keeps them in the

59. See A. Bloom, *The Closing of the American Mind: How Higher Education Has Failed Democracy and Impoverished the Souls of Today's Students* (1987). Bork himself notes the analogy to Bloom. See *The Tempting of America*, supra note 13, at 137 (quoting letter from Gertrude Himmelfarb comparing the "subversion" of the legal academy with that of literary and historical scholarship).

60. The most notable example of this phenomenon is the debate over pornography, which both Professor Catharine MacKinnon and Edwin Meese would ban, on similar theories. Compare C. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* 187 (1987) (arguing that pornography should be banned because of tendency to incite sexual violence) with U.S. Dep't of Justice, Attorney General's Commission on Pornography, Final Report 325-26 (1986) (arguing for banning of pornography for same reasons). This same convergence also extends, at times, to perspectives regarding the nature of law. See Posner, *A Manifesto for Legal Renegades*, Wall St. J., Jan. 27, 1988, at 23, col. 4 ("The pooh-bahs of the legal profession exaggerate the neutrality of legal doctrines . . . ; understate the law's political and contingent nature; . . . and make unfounded claims for the cogency of legal reasoning.") (reviewing M. Kelman, *A Guide to Critical Legal Studies* (1987)).

61. *The Tempting of America*, supra note 13, at 223.

62. *Id.* at 313. The subject of Edwin Meese raises another very serious question about *The Tempting of America* and about Robert Bork. At one point in his denunciation of non-originalists, Bork takes strong exception to Justice Brennan's condemnation of originalists as "arrogant" for "pretend[ing] that from our vantage we can gauge accurately the intent of the Framers on application of principle to specific, contemporary questions." *Id.* at 162 (quoting Brennan, Speech to the Text and Teaching Symposium, Georgetown University (Oct. 12, 1985), reprinted in *The Federalist Society, The Great Debate: Interpreting Our Written Constitution* 11 (1986)). Bork says that "Justice Brennan demolished a position no one holds, one that is not only indefensible but undefended." *The Tempting of America*, supra note 13, at 162. Justice Brennan was in fact responding to the position put forth earlier by then-Attorney General Meese regarding

dark as to where Graglia, Meese, and Berger have said the "original understanding" leads.⁶³ This is especially so since everyone who does get examined closely—with names as diverse as Brennan, Tribe, Brest, Ely, Epstein, Harlan, and Rehnquist—is either too authoritarian, or too philosophical, or too political, or too libertarian, or too ahistorical, or too result-oriented—or too *something*—to suit the taste of Robert Bork.

Part of what accounts for *The Tempting of America's* appearance now, of course, is that the Bork Affair made its author a celebrity. But another reason for the timing of this attack may lie in the substance, not merely the occurrence, of the Bork appointment controversy. For twenty-five years (thirty-five, if one counts "Impeach Earl Warren"), conservatives had such great success denouncing activist results that a major theoretical attack was never called for. During the Bork Affair, it emerged that people were more accepting than the Bork camp had thought of this supposedly illegitimate judicial activism.⁶⁴ Hence, an explicitly ideological attack on *nouveau* theory became essential, not because law school heretics were involved, but because when the people's elected representatives passed judgment on the Court's results and policies, it was the "heretics" who won.

Unfortunately for Bork, however, the obvious contradictions in his history and the over-heated nature of his theoretical denunciations are not all that will make his arguments hard for many ordinary readers to accept. It is his basic choice of rhetorical style that ultimately backs him into an untenable position. Bork's premise is, of course, that nonoriginalist review is wrong because it is antidemocratic, and *The Tempting of America* consequently adopts a steadfastly populist point of view—a point of view that serves nicely for denouncing activists in the judiciary and elitists in the schools. But *The Tempting of America's* readers immediately will notice that the part of the campaign against him about which Bork and his supporters most vociferously complain has to do with the democratization of the confirmation process—the adver-

the need for fidelity to "the original intention of those who framed the Constitution." See Meese, *Toward a Jurisprudence of Original Intention*, 2 *Benchmark* 1 (1986).

63. This may be an intelligent thing for Bork to do, given the conclusions to which some originalist theories lead. See R. Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* 284 (1977) ("the framers of the Fourteenth Amendment . . . [explicitly] exclude[d] suffrage and segregation from the ambit of its terms"); Graglia, *Response*, 14 *Nova L. Rev.* 83, 85–86 (1989) ("legislators can read, and unconstitutional laws do not get enacted").

64. Bronner reports that the anti-Bork coalition's polls established that, while very few Americans had any great degree of knowledge of the Court (only one-third knew it had nine members, for example), only "23 percent [thought] that it wielded too much influence on the country's affairs." *Battle for Justice*, *supra* note 22, at 158–59; see also T. Marshall, *Public Opinion and the Supreme Court* 78–79 (1989) (results reached by Supreme Court largely consistent with views of general public); Schneider, *Americans Satisfied with Judicial Status Quo*, 19 *Nat'l J.* 2612 (Oct. 17, 1987) (people evenly divided between those who find the court too liberal and those who find it too conservative; overall, polls find "basic satisfaction").

tisements, the lobbying, the organizing, and the letters. Leaving aside whether the popularization of the confirmation process represented anything genuinely new⁶⁵—or more “political” than what the originalists’ revered Founding Generation did⁶⁶—this complaint still must strike the ordinary reader as rather strange. If judicial review is to be conducted in a fundamentally “democratic” way, this reader may well ask, why should not the appointment and confirmation process? To *The Tempting of America*’s audience, Bork and his supporters must seem to be asserting two irreconcilable ideas: that the “activists” should simultaneously be condemned for being too antidemocratic in the courts, and for being too democratic out of them.

Bork and his supporters are right, of course, to ask whether “going to the people” over his nomination was a proper or productive thing to do. But to discuss this issue seriously requires more than populist table-thumping: it requires a careful and nuanced discussion of the history of, and values implicated by, separation of powers issues. For Bork to conduct such a discussion—for him to explore the paradoxical connection between contemporary populism and the countermajoritarian institution—he would have to drop the populist style so central to *The Tempting of America*’s voice. His choice of a particular constitutional vernacular thus not only oversimplifies the issues, but actually impedes, at this crucial juncture, his ability to articulate his own argument in anything like a convincing fashion.

Moreover, Bork, like many of his supporters, further aggravates his

65. After attacking the special interests since the 1970s, the Right has often seemed genuinely surprised that in the Bork Affair those same interests behaved the way that “special interests” do—by organizing, lobbying, pressuring, and advertising to achieve the legislative results they want. See, e.g., Garment, *The War Against Robert H. Bork*, Commentary, Jan. 1988, at 19 (attacking “outsider” confirmation politics). The irony was all the greater in that the specific tactics liberal special interests used to defeat Bork were learned from the Right-wing ones—single-issue politics, targeted mass-mailings, talk show saturation, polling and opinion sampling, and simplified appeals to basic insecurities and fears. Bork himself studiously (and quite wisely) neglects to mention the Right’s own highly similar campaign just one year earlier against California Chief Justice Rose Bird. Not only does the Bird campaign detract from arguments about the novelty of the anti-Bork campaign, but attempting to justify it would be very costly. To justify the Bird campaign, and still denounce the one organized against him, Bork and his supporters would almost certainly have to draw distinctions between state and federal courts, and between term elected and life tenured positions, that would profoundly undermine bedrock conservative arguments concerning federalism, which depend heavily upon the judicial “myth of parity.” See generally Neuborne, *The Myth of Parity*, 90 Harv. L. Rev. 1105 (1977) (restrictive attitudes toward the assertion of federal jurisdiction are based on false assumption that state courts are equally hospitable to civil rights and liberties claims, and are equal in terms of judicial independence).

66. The early Congress was hardly apolitical when it came to Justices and judges that it did not like. See R. Berger, *Impeachment: The Constitutional Process* 155–56 (1973) (early Congresses’ use of the impeachment power against the federal judiciary as a political device); Monaghan, *The Confirmation Process: Law or Politics*, 101 Harv. L. Rev. 1202, 1206 (1988) (reviewing history of the appointment process).

predicament through an additional self-imposed disability. Unable to achieve any emotional detachment whatever from their cause—unable to distinguish in the slightest between their intellectual and their political positions—Bork and his camp appear entirely incapable of keeping separate the propriety of a popular nomination controversy in the abstract from the propriety of what Bork's opponents actually said and did in the case of Robert Bork. Thus, condemnations of individual alleged distortions, or of other actions occurring in the Bork Affair, become blended with denunciations of the idea of "going to the people" at all.⁶⁷ Not only does this result in a general impression of intellectual disorder and confusion on the part of those who supported Bork, but it also tends to lend an unattractive sour grapes tone to all of the Bork camp's arguments. To make matters even worse, by constantly harping on the issue of distortions, Bork and his supporters also establish an impossibly high standard of review for their own work. If "distortion" is what really delegitimizes his opponents' campaign against him, then Bork's own tactics must be absolutely unimpeachable for him to win the battle on the terms that Bork himself has said are crucial. But even a casual reading of *The Tempting of America* makes clear that Bork employs the same distorted and oversimplified approach to his mass audience that he says he is against.

Similar problems also plague, and ultimately fatally undermine, Bork's larger arguments concerning his theory's alleged political "neutrality," a claim upon which virtually everything else is based. If Bork concedes a role for personal or political choice at all, his entire argument from theology crumbles: we are no longer talking about heresy

67. For the best example of this phenomenon, aside from Bork, see Suzanne Garment's powerful article, *supra* note 65. Garment brushes off historical arguments concerning the politicization of the confirmation process in the past, focusing her ire on the anti-Bork coalition's "national media campaign." *Id.* at 18, 19. Like Bork, she denounces a great many "lies" lodged against Bork, without detailing who made them or where they appeared. *Id.* at 20. She then concedes that the Right's failure to mount a major counterattack was not based upon a concern for fundamental principle, but resulted from what turned out to be a flawed, "self-effacing" political strategy directed from the White House. *Id.* at 21. Elsewhere, she seems to suggest that a more appropriate model for a "politicized" confirmation process might be found in the cases of Clement Haynsworth and Abe Fortas. In both cases, she says, opposition to the nominees was "politically motivated," but the nominees' opponents managed to discover more "neutral" grounds—financial impropriety and conflicts of interest—on which to base their public opposition. *Id.* at 25. Garment's objections boil down to the fact that the anti-Bork coalition impermissibly crossed "the line between the insider politics of judicial selection and the constituency politics of a national political campaign," *id.* at 26, even though she concedes that past "insider" politicking has itself been fierce. Like Bork, Garment apparently believes that only liberals are careless with the truth in judicial selection controversies. But see Ginsburg, *supra* note 6, at 115–16 (California "Law and Order Campaign Committee" attacked Rose Bird in 1986 for allegedly making fifteen condemned killers eligible for release, when the single case involved reduced a set of capital sentences to life imprisonment, with the possibility of parole—and was decided before Bird was appointed to the bench).

and Revealed Truth, but about specifics, policy, and matters of degree. Since Bork's High Church rhetoric has no room for the many compromises reality inevitably requires *The Tempting of America* to make, the reader faces a choice between viewing his book as large-scale hypocrisy or a complete muddle. And the oddest result of all of this is to leave what was perhaps the most serious issue at Bork's confirmation hearings—his attitude toward prior precedent—in continuing and hopeless obscurity, and with it the question of the threat his nomination really posed to the legal and social status quo. His position in *The Tempting of America* remains as reasonable and vague as ever,⁶⁸ converting this crucial question once again into a matter of character and trust. But trust in Robert Bork is exactly what *The Tempting of America* least inspires.

Both as religious tract and "cultural war" polemic, *The Tempting of America* in the end reminds us of a harsh old lesson: that it can sometimes be disastrous to rush too quickly to seize all of the high ground.

II. IN THE PEOPLE'S COURT

Probably the most unfortunate effect of *The Tempting of America* will be the degree to which it will keep future analyses of the issues raised by the Bork Affair locked into current Left-Right terms, and tied to the particular personality and controversy giving rise to it.⁶⁹ But much larger and more enduring issues are involved. Any mass-oriented constitutional controversy—whether it be Bork, abortion, flag-burning, the death penalty, or something else—presents the problem of finding a proper means of framing constitutional arguments for a general audience. In coming years, it seems fair to expect that more and more values once plausibly thought susceptible to judicial protection must be protected, if at all, through the political branches and electoral process.

68. *The Tempting of America*, supra note 13, at 155–60. For Bork, the relevant factors include: (1) whether the precedent is recent; (2) whether it reflects a "good faith attempt to discern the original understanding," *id.* at 157; and (3) whether the "incorrect" precedent has "become . . . embedded in the life of the nation," *id.* at 158. Overall, he suggests, "those who adhere to a philosophy of original understanding are more likely to respect precedent than those who do not." *Id.* at 159.

69. For all the heat that it has generated, the basic politicization issue is, perhaps surprisingly, rather easily disposed of in both practical and theoretical terms. For one thing, since the Affair concluded, commentators as diverse as Henry P. Monaghan and Mark Tushnet have recognized in their Affair-inspired work that a politicized confirmation process is, in principle, well within the bounds. See Monaghan, supra note 66, at 1206–07 (reversing view asserted at Bork confirmation hearings and acknowledging the long history of politicized appointments); Tushnet, *Principles, Politics, and Constitutional Law*, 88 Mich. L. Rev. 49 (1989) (justifying a politicized process in "political question" terms). Indeed, but for the fact that constituency pressure was actively generated with regard to Bork, the Affair differs little from the Brandeis, Marshall, Fortas, Haynsworth, and Carswell nominations, to name just a few, in which Senators acted on their own assumptions concerning their constituents' preferences. See generally Freund, *Appointment of Justices: Some Historical Perspectives*, 101 Harv. L. Rev. 1146, 1157–61 (1988) (tracing history of politics in the appointment process).

And whether a responsible sense of constitutional citizenship can be created,⁷⁰ inside the legal academy and without, therefore now becomes more and more the central question.

Despite the normative trend so dominant in legal scholarship, however, scholars have thus far been noticeably "reluctant to tie their sophisticated intellectual insights to the concrete problems" of constitutional adjudication,⁷¹ much less to popularly-oriented politics. At an abstract level, there is, as usual, little disagreement about how the legal scholar ideally should behave or speak. From Mark Tushnet⁷² to Senator Orrin Hatch,⁷³ all concerned believe that the scholars' role in popular constitutional disputes is to "contribute to the development of an informed and principled electorate,"⁷⁴ without abusing their "peculiar rhetorical resources" and "positions of influence in discussions of constitutional structure."⁷⁵ At a more practical level, however, things are not so simple: if the effective advocate "can communicate only within the areas of experience of his audience,"⁷⁶ the demands of modern politics and communication may well mean that carefully worked-out theories of interpretation must be sacrificed, or grossly oversimplified, in the interest of effective popular communication. During the Bork Affair, progressive, activist scholars improvised a simplified, mass-oriented rhetoric, and learned to work with others, associating their ideas and reputations with the concrete tactics chosen by activists and politicians less inhibited than professional scholars by concerns of long-term principle. Swept up by the emotions and exigencies of the event, progressive legal scholars, together with their interest group and politician allies, adopted almost unthinkingly the "thirteenth rule" of bard-bitten, and sneeringly unscholarly, Chicago organizer Saul Alinsky: "Pick the target, freeze it, personalize it, and polarize it."⁷⁷ For

70. See Brest, *Constitutional Citizenship*, 34 *Clev. St. L. Rev.* 175, 197 (1986). For some time, Dean Brest seems to have had the field largely to himself when it comes to discussion of the relationship between legal scholarship and popular constitutional discourse. Though believing that the "18th century American version of Republicanism depended upon an assumption that seems implausible in our own time," *id.* at 192, Brest too endorses the goal of political "participation that induces us to listen to other people's positions and justify our own," *id.* at 194, so as to prevent our "reaching conclusions premised on incomplete understandings of their consequences for others." *Id.*

71. Lupu, *Constitutional Theory and the Search for the Workable Premise*, 8 *U. Dayton L. Rev.* 579, 579 (1983).

72. Tushnet, *supra* note 69, at 80-81.

73. Hatch, *The Politics of Picking Judges*, 6 *J.L. & Pol.* 35, 38 (1989).

74. Tushnet, *supra* note 69, at 81; see also Hatch, *supra* note 73, at 38 (noting expectation, in his view sadly unfulfilled during the Bork Affair, that "law professors and historians" would be "committed above all else, to championing the give and take of intellectual discourse in the marketplace of ideas").

75. Tushnet, *supra* note 69, at 81.

76. S. Alinsky, *Rules for Radicals: A Pragmatic Primer for Realistic Radicals* 69 (1971).

77. *Id.* at 130.

opposing Bork, this tactic surely worked. But such tactics are hardly the stuff of which "deliberative discourse" ever will be made.

The excesses of Bork's popularly targeted book, the widely noted ineffectiveness of his testimony at his nationally televised hearings, the crudeness of the charges made against him on the podium and in the press—all of these raise the question of how and whether scholarly participants in constitutional politics can reconcile "the public vocabulary and technical legal discourse, the universal value and the partisan interest"⁷⁸ in a manner that is honest, effective, and fair. In the age of television, in particular, is it really possible for analytically-minded legal scholars, with their fine-tuned ways of speaking, ever actually to play the role Michael Walzer has called the "national-popular intellectual"—one who "speaks the common language,"⁷⁹ articulating strong positions that are "national in idiom, popular in argument"⁸⁰—without unduly compromising their scholarly identities? Unfortunately, the Bork Affair, and the events surrounding the subsequent nomination of Judge Kennedy, provide sobering evidence that converting "civic republicanism" from ideal into reality in a contemporary mass democracy may be very difficult indeed. And they may suggest as well that Robert Bork's late adversaries have been a little hasty in congratulating themselves on the quality of the national debate that led to Bork's defeat.

A. *On the Offensive*

Battle for Justice, *The People Rising*, and the more recently arrived *Ninth Justice* go over the Bork Affair in considerable detail, as does the last third of *The Tempting of America*. Although Boston Globe reporter Ethan Bronner has been subjected to harsh criticism by Bork sympathisers for supposedly having fallen under the liberals' sway,⁸¹ his *Battle for Justice* in fact represents a thoughtful and even-handed reconstruction of the Bork Affair, loaded with inside information concerning the Senate, the White House, the Justice Department, and interest groups both Right and Left. Focusing heavily (though far from exclusively) upon the machinations involved in the Judiciary Committee's hearing process, and punctuated with astute off-hand remarks and illuminating portraits of the leading players, it provides a helpful supplement to *The People Rising*, which is concerned almost exclusively (and extremely sympathetically) with the anti-Bork interest groups' organizing and advertising tactics. From the pro-Bork Right, *Ninth Justice*, the work of two experienced and well-connected Washington-based con-

78. C. Condit, *Decoding Abortion Rhetoric: Communicating Social Change* 97 (1990) (comparing legal discourse with other forms of public address).

79. M. Walzer, *The Company of Critics: Social Criticism and Political Commitment in the Twentieth Century* 233 (1988).

80. *Id.* at 235.

81. See Rinzier, *The Trials of Robert Bork*, *Washington Post Book World*, Sept. 24, 1989, at 1, 10.

servatives, shares *The People Rising's* focus on the concrete political nuts and bolts. More clear-eyed in its political analyses than many pro-Bork accounts, *Ninth Justice* does not attribute Bork's defeat in the Senate entirely to irresponsible and unethical left-wingers. Rather, as *Ninth Justice* sees it, the conservative activists' own ineffectualness, combined with gross political mismanagement by the Reagan White House, did much to bring about what it sees as a most unfortunate result.

The People Rising is a shrewd and clever work, an elegy to the anti-Bork campaign to match Bork's jeremiad. *The People Rising* finds little fault with the anti-Bork campaign, largely because—quite wrongly—it does not see the public part of the anti-Bork campaign as having been particularly important. Its conclusion, shared somewhat by Bronner, is that the public side of the campaign served mostly to stall the confirmation process long enough to require wavering Senators to study what *The People Rising* calls the “Book of Bork”—the many studies of his record the scholars and the interest groups rapidly produced⁸²—and to require a particularly searching set of hearings. But if representations made in the course of the campaign were not the basis of individual Senators' votes (a less than crystal clear assumption, since some Senators voted against Bork for reasons most unusual),⁸³ that campaign was nonetheless vital in convincing Senators that the wrong vote could be costly and that they should proceed with care. In different ways, all of these accounts make clear that the anti-Bork campaign's success lay precisely in the sophistication of its approach to the mass political audience, its construction of a popular campaign with two significant dimensions relevant to possible “republicanism”: the choice of issues on which Bork's confirmation was to be contested, and what was to be said about those issues once they were selected. And these accounts also all illuminate most clearly the constraints that modern media techniques place upon efforts to conduct a “deliberative” version of constitutional politics in the modern age.

At one level, *The People Rising's* claim that the anti-Bork campaigners' advertising “did not buy Bork's defeat” has considerable validity.⁸⁴ Though McGuigan and Weyrich take a different view, consistent with the Bork camp's general outrage on this subject, *Battle for Justice* and *The People Rising* both conclude, and with substantial evidence, that the anti-Bork coalition's ability to generate free media was a far more important factor in its success than any media that it bought.⁸⁵ Carefully coordi-

82. See *The Bork Nomination*, supra note 6, at 187–508.

83. Bronner notes several: one Senator said his doubts about Bork's belief in God contributed to his decision; another declined to vote for Bork because of the very existence of a controversy; a third because he felt Bork was, in some unspecified way, “strange.” *Battle for Justice*, supra note 22, at 294–95.

84. *The People Rising*, supra note 8, at 272.

85. The authors of both *Battle for Justice* and *The People Rising* estimate that a total of no more than two million dollars was spent for media purchases by Bork's opponents, despite the Bork forces' constantly repeated claim that the sum approached ten to fif-

nating every opportunity to be on talk shows or in the press, assiduously cultivating individual reporters, and conducting a masterful behind-the-scenes "quick response" operation during the Judiciary Committee hearings—the anti-Bork campaigners exercised superior and sophisticated "spin control" at every turn. But their very success in managing and earning such free coverage serves only to focus more attention on the campaign's substance. Here the post hoc judgment of the campaign necessarily must be less than favorable, and the strongest evidence that the charges levied against Bork were less than wholly fair comes, ironically, not in the many attacks on the campaigners' efforts made by Bork's supporters, but in the visibly defensive way in which *The People Rising* attempts to justify them.

For his part, Ethan Bronner is direct and very harsh, stating flatly that the anti-Bork campaign "went with outrage"⁸⁶ as much as fact. Routinely "par[ing] away subtleties, complications, and shadings"⁸⁷ in framing its appeals to the general public, the anti-Bork coalition frequently suggested that Bork's often complicated views on "hot button" public issues were based solely upon his values and his politics, instead of upon at least colorable legal or constitutional concerns.⁸⁸ Bronner also discloses that *The People Rising's* co-author Michael Pertschuk prepared an influential memo about "seizing the symbols" of the debate for the anti-Bork coalition,⁸⁹ a fact minimized, possibly out of modesty,

teen million dollars. Battle for Justice, *supra* note 22, at 149; *The People Rising*, *supra* note 8, at 271. This is plainly a modest sum, especially when compared to the Right's own 1986 campaign against California Chief Justice Rose Bird, in which the Right spent at least an equal amount in a single state. Cf. Balzar, *Bird's Opponents: Who Are They and What Do they Have to Say?*, L.A. Times, Jan. 20, 1986, at 3, col. 1; see also Broder, "When Judges Are Lynched To Appease The Public," Wash. Post, Oct. 6, 1987, at A21, col. 1 (Bird defeated by "multimillion dollar" campaign). In the Bork Affair itself, moreover, the Right's failure to respond in kind to the anti-Bork interest groups' "paid media" was attributable to a lack of money, not a Puritan concern with principle, as *Ninth Justice* shows at length. A single pro-Bork group in California, for example, raised some \$200,000 to advance his confirmation, but its avowed fundraising target, two million dollars, would have come close to the sum spent by the anti-Bork forces had the full amount been raised. See Battle for Justice, *supra* note 22, at 202–03. The conservatives' efforts to activate their existing political networks on Bork's behalf also were extensive (one senator received a flood of letters urging him to "Vote for Bark"). *Id.* at 182.

86. Battle for Justice, *supra* note 22, at 179.

87. *Id.* at 160.

88. Cf. Sager, *supra* note 31, at 26 ("Bork's view of a particular legal arrangement or practice as not violating the Constitution, or not otherwise illegal, was often presented to the public by his opponents as though he actually approved of the arrangement or practice."). The most controversial instance of such oversimplification was his opponents' presentation of Bork's views of mandatory sterilization. See *infra* notes 106–109 and accompanying text.

89. Battle For Justice, *supra* note 22, at 156. Pertschuk argued that the anti-Bork coalition should seek out effective "alternative labels and countersymbols" to respond to anticipated White House propaganda. *Id.* He especially focussed on labels designed to portray Bork as an "ideologue." *Id.* at 157.

in Pertschuk's own account, but which may help explain *The People Rising's* curious approach to the accuracy issue. Bronner, like McGuigan and Weyrich, says that the opponents of the nomination latched on to Bork as "an issue to embody their anger and frustration of seven years"⁹⁰ on labor, consumer, and civil rights issues, and that the nomination fight involved a great deal of pent-up spleen-venting on the part of many politicians and outside liberal groups.

In Bronner's view, the anti-Bork campaign was so powerful and effective not because it was false, as Bork charges, or so different from what the Reagan Administration did, as *The People Rising* contends,⁹¹ but precisely because the anti-Bork campaign and Reagan election efforts were so similar. In his view, both proceeded, and most artfully, on the basis of half-truths.⁹² But Bronner also records, as Bork does, one particularly egregious case of outright falsehood in the course of the campaign: a Planned Parenthood advertisement saying Bork had "upheld a local zoning board's power to prevent a grandmother from living with her grandchildren."⁹³ Bork, in fact, had had nothing to do with *Moore v. City of East Cleveland*,⁹⁴ and the decision was one of the few things on which Bork had never actually directly commented.⁹⁵ Bronner and Bork, together with McGuigan and Weyrich, further detail a variety of other, mostly less severe offenses, in and out of the Judiciary Committee hearings.⁹⁶ Bronner notes as well the statistical biases in many of the anti-Bork reports and their subsequent use to construct "unfair general statements."⁹⁷

90. *Id.* at 187.

91. According to *The People Rising*, the anti-Bork effort was actually a good thing for contemporary public discourse, because it "elevated the public dialogue by invoking symbols fairly connected" to the nominee's record rather than what it describes as the pure "defactualized" symbols ordinarily invoked by the Reagan Administration. *The People Rising*, *supra* note 8, at 269.

92. *Battle for Justice*, *supra* note 22, at 160.

93. *Id.* at 179.

94. 431 U.S. 494 (1977).

95. On the other hand, Bronner and other commentators apparently overlook Bork's favorable citation of Justice White's dissent in *Moore* in his opinion concerning gay rights in the military. See *Dronenberg v. Zech*, 741 F.2d 1388, 1396 (D.C. Cir. 1984). Oddly enough, this citation in Bork's *Dronenberg* opinion was mentioned in the White House Report issued in support of Bork's nomination. See *The White House Report*, *supra* note 11, at 207. While this is not an explicit rejection of the result in *Moore*, it does suggest that Bork was less than an enthusiastic supporter of the opinion.

96. For example, the National Abortion Rights Action League ran an advertisement in major newspapers stating that Bork would "wipe out every advance women have made in the 20th century." *Battle for Justice*, *supra* note 22, at 179; see also R.H. Bork, Jr., *The Media, Special Interests, and the Bork Nomination*, in *Ninth Justice*, *supra* note 8, at 245-78 (detailing numerous charges made against his father).

97. *Battle for Justice*, *supra* note 22, at 151. One "highly influential study" of Bork's judicial record, Bronner notes, was based exclusively upon split cases, about 10% of those upon which Bork had sat. *Id.* Although Bork had ruled the same way as the D.C. Circuit's most liberal judges approximately four times out of five, the studies were

In contrast, and despite acknowledging in passing certain "rhetorical excesses and oversimplifications,"⁹⁸ *The People Rising* finds that the campaign, taken as a whole, was fair.⁹⁹ Yet the route by which *The People Rising* arrives at this conclusion is elliptical, to put it mildly. The authors of *The People Rising* begin by declining "to referee arguments over the fine points of the Bork record," asserting, remarkably for any book on the Bork Affair, that to do so "is beyond our expertise."¹⁰⁰ Promptly changing the subject, Pertschuk and Schaetzel then assert that the real "fairness" question is whether the "fears"—not the charges—"expressed by the Bork opponents . . . were fairly grounded in the Bork record and his articulated judicial philosophy," comfortably concluding that "the campaign waged by the anti-Bork coalition was fundamentally fair" by this subjective and self-referential "standard."¹⁰¹ They give the last word on the subject to the impassioned former Representative Barbara Jordan who, while strongly denying mendacity on the part of Bork's opponents, also suggests that a "concern with justice" is always more important than a concern with "negative campaign tactics" anyway.¹⁰²

As *Battle for Justice*, *The People Rising*, and *Ninth Justice* all make clear, the scholarly community's involvement in the effort to reach the wider public, and to defeat Bork, was extensive and multifaceted. A small number of legal scholars participated (just) behind the scenes, by advising individual Senators on the Committee, both regarding Bork's record and the propriety of holding an issue-oriented proceeding. Many, including some of the same ones, participated more visibly by testifying at the hearings. Still others helped prepare the various anti-Bork reports, and several cast serious doubt upon Bork's claim to originalist political "neutrality" in an admirably "republican" fashion through articles and columns in the press.¹⁰³ On the last day of the hearings,

used, says Bronner, to suggest that Bork was "a lonely radical on the bench." *Id.* Bork's opponents, of course, maintained that split cases are those most likely to indicate where a prospective Justice might stand on open or unsettled issues.

98. *The People Rising*, *supra* note 8, at 263.

99. *Id.* at 267 ("[T]he judgment of fairness seems to depend largely upon the prism through which the observer views the sum of the parts of the Bork record, and Bork himself as a judge and as a human being.").

100. *Id.*

101. *Id.* at 268-69.

102. *Id.* at 269.

103. See Dworkin, *The Bork Nomination*, 34 N.Y. Rev. Books 3 (Aug. 13, 1987) (attacking notion that Bork, and Borkean "originalism," are really politically neutral); Kurland, *Bork: The Transformation of a Conservative Constitutionalist*, Chi. Trib., Aug. 18, 1987, at 13, col. 1 (detailing changes in Bork's positions over time); see also Dworkin, *From Bork to Kennedy*, 34 N.Y. Rev. Books 36 (Dec. 17, 1987) (artfully arguing that the defeat of Borkean originalism is a significant event because Kennedy's methodology, even if conservative in terms of its results, will be "principled," rather than narrowly "historical"). While it does not answer every question, the latter Dworkin article is, in general, an exception to much of the criticism set forth here.

Judiciary Chairman Biden dramatically released a list, said to include the names of some forty percent of all law teachers in the country, of scholars who had written in to oppose Bork.¹⁰⁴ This list of law professors publicly opposing Bork proved remarkably attention-getting indeed, taken, as it was surely meant to be, as constituting evidence of direct and substantial scholarly endorsement of the interest groups' energetic efforts. In the view of one of the Affair's most astute observers, these scholarly petitions constituted "the most extraordinary and devastating judgment" rendered against Bork during the whole affair.¹⁰⁵

None of these books reports any significant public dissent from the coalition's result-oriented tactics or statements, or the frequently even more broadly framed arguments of the Senators, launched from within the scholarly community, aside from criticisms coming from those who approved of Bork's nomination. At the hearings, no interest group representatives testified, so as to keep the Committee's focus on Bork's views, instead of making public targets of their own. Acting as though in concert, numerous witnesses from the legal academy presented the Senators with the same critique of Bork that the interest groups would have offered, but from a more "disinterested" perspective; and many of those whom the Committee heard did not shy away from result-oriented presentations.¹⁰⁶ Though one professor prominently involved in

104. Bork Hearings, *supra* note 16, at 3349. The author's name appears at 3388. Senator Hatch has asserted that "many" of those who have signed such letters have told him that they "feel chagrined that they were stampeded" into doing so, because "[t]hey realize on reflection that such an approach, which forecloses debate and the free interchange of ideas, is incompatible with American values." Hatch, *supra* note 73, at 38 n.7.

105. Dworkin, *From Bork to Kennedy*, *supra* note 103, at 38. Another candidate for this honor, obviously, would have to be the split verdict rendered by the 15-member Select Committee of the Federal Judiciary of the American Bar Association. As Bronner notes, the ABA had not had a split vote on a Supreme Court nomination in sixteen years, and the ABA ratings had never previously recorded a "not qualified" vote, of which Bork received four. *Battle for Justice*, *supra* note 22, at 205. There is evidence that the ABA may have come somewhat to regret this judgment. See *infra* note 160.

106. Because their testimony consistently, and understandably, took the form of attacks upon Bork's record and statements, few of the professors who testified against him advanced affirmative versions of the specific results they would like to see. Instead, much of the testimony (more or less) followed a formula: first, a gracious acknowledgement of Bork's learning and integrity; then, a detailed analysis designed to show that his "confirmation conversion" was not to be trusted; and finally, a critique of his insensitivity to the position of various disfavored groups, particularly minorities and women. See, e.g., Bork Hearings, *supra* note 16, at 2358 (statement of Professor Sylvia Law); *id.* at 2515 (statement of Professor Thomas C. Grey); *id.* at 3027 (statement of Professor Herma Hill Kay); see also *id.* at 2495 (statement of Professor Owen M. Fiss).

On the whole, the effort was not so much to show that originalism was conceptually or historically fallacious as that it was socially undesirable (not to mention, in Bork's case, something of a smokescreen for other reactionary views) and a break from what the Court had in fact been doing. Some appeals were made directly to concepts such as privacy and reproductive freedom, but the one anti-Bork professor who actually elaborated upon his own expansive views on privacy and sexual autonomy was the one profes-

the Affair denied that his personal political views had "anything to do" with his participation,¹⁰⁷ one may fairly doubt that the feeling was universal. If many of the campaign's claims were "exaggerated," or more concerned with being loyal to the campaigners' "fears" than to the facts, there is considerable evidence to suggest that many segments of the scholarly community passively supported, at least as silent partners, the interest groups and politicians who led the less than perfectly scrupulous campaign against Bork.

In a telling comment on the way in which Bork's opinion in a controversial D.C. Circuit workplace sterilization case¹⁰⁸ was used, Bronner notes a fact of considerable, if subtle, significance to the underpinnings of the whole campaign, and to the scholars' role in it—a point *Ninth Justice* documents in more detail with respect to other issues. According to Bronner, the prominence of the sterilization issue in the anti-Bork campaign was attributable not to genuine fears on the part of the campaigners, but to the fact that anti-sterilization sentiment had been found to be a particularly strong theme among the public in the coalition's polls.¹⁰⁹ The scent of intentional and cynical manipula-

sor who was severely pummelled. *Id.* at 3047–3108 (testimony of Professor David Richards). The report of the Senate Judiciary Committee Chairman's consultants, two of whom were professors of law, also took an issue-oriented approach to disprove White House claims that Bork's views could legitimately be considered to be moderate. See Report of the U.S. Senate Judiciary Committee Chairman's Consultants in the Bork Nomination, *supra* note 6, at 219 (1987).

Of course, not every professor who testified stuck to the general formula. See, e.g., Bork Hearings, *supra* note 16, at 2528–31 (testimony of Professor Judith Resnik) (focusing on Bork's apparent lack of concern with "the painful reality of judging," "the stridency of the tone" of Bork's jurisprudence, his "impatien[ce] with the case-by-case method of adjudication," and his alleged lack of concern for the fact that "[l]awsuits are about real people, real lives"). One witness took particular care to distinguish between what Bork's opinion in the sterilization case, see *infra* notes 108–109, could and could not actually be said to stand for. See *id.* at 3089 (testimony of Professor Kathleen Sullivan) ("[W]e cannot say this proves Judge Bork is for sterilization. He is not for sterilization . . . [what we can say] is that he was not sensitive . . . to the importance of our powers of child-making, our right to procreation . . . and that is a sensitivity I would hope that a Justice of the Supreme Court would have.").

107. Bork Hearings, *supra* note 16, at 1314 (testimony of Professor Laurence Tribe).

108. *Oil, Chemical & Atomic Workers Int'l Union v. American Cyanamid Co.*, 741 F.2d 444 (D.C. Cir. 1984). The frequently suggested conclusion from Bork's decision in this case was that he saw no objection to mandatory sterilization of female workers. In fact, the case only concerned an administrative law judge's conclusion that the employer practice in question was not in violation of the Occupational Safety and Health Act. See *supra* note 106 (testimony of Professor Kathleen Sullivan); *Battle for Justice*, *supra* note 22, at 178 (privately expressed objections to coalition's use of *Cyanamid* case by Professor Laurence Tribe).

109. *Battle For Justice*, *supra* note 22, at 178–79. These polls also led to other strategy judgments. See *id.* (noting attempts to characterize Bork's record as favoring the interests of "big business" and the wealthy). Bronner's findings with respect to the sterilization case no doubt strike readers in 1990 as somewhat counter-intuitive. In 1990, the issue of workplace sterilization seems far from frivolous. See International

tion of the public hangs heavily around this question, and permeates the whole campaign, suggesting that scholars involved in the effort to defeat Bork had associated themselves with something that was less than even an attenuated effort to promote real "deliberative discourse."

From the very beginning, another issue-selection problem also haunted the anti-Bork campaign, one that made quick resort to "exaggeration" unusually attractive. The problem was that Robert Bork presented too easy a target. Because he had condemned *Griswold v. Connecticut*¹¹⁰ (as he does again in *The Tempting of America*),¹¹¹ Bork could be opposed on grounds of "privacy" without raising the issue of abortion. Because he had used highly intemperate language to denounce the Civil Rights Act of 1964—his famous "principle of unsurpassed ugliness" phrase¹¹²—questions concerning his bona fides on racial matters generally could substitute for close discussion of "quotas" and affirmative action. And because he had no particular background in constitutional criminal procedure, and then refused to pretend to,¹¹³ what could have been a powerful conservative argument for confirmation—the standard demagoguery about defending "law and order"—did not have much power.¹¹⁴ Bork's provocative writings were so strident that departures from what Bork had actually said or done were overly tempting, too, leading the anti-Bork campaigners to believe that if he had not actually done or said something, he might as well have done so.

Shifting the debate away from controversial issues that might actually have come before Bork as a Justice was undoubtedly tactically brilliant. But the tactical brilliance of this maneuver does not mean that it was consistent with promoting a more "republican" brand of politics. As Bork notes,¹¹⁵ his opponents never even attempted to explain where the necessary additional four votes were to come from for him actually to implement, as opposed merely to articulate, his presumed reactionary goals upon his confirmation.¹¹⁶ There is no contradiction between

Union v. Johnson Controls, Inc., 886 F.2d 871 (7th Cir. 1989), cert. granted, 110 S. Ct. 1522 (1990) (fetal protection policy upheld on sex discrimination challenge). It does appear, however, that the issue received prominent treatment in the fall of 1987 not because of its intrinsic importance, but strictly because it looked like it would be exceptionally effective in generating popular pressure on the Senators.

110. 381 U.S. 479 (1965).

111. *The Tempting of America*, supra note 13, at 95–100.

112. Bork, *Civil Rights—A Challenge*, *The New Republic*, Aug. 31, 1963, at 21.

113. "I am not an expert in criminal law," he testified in response to one sympathetic questioner, effectively destroying efforts to make this issue work for him. *Battle for Justice*, supra note 22, at 234.

114. But see Ninth Justice, supra note 8, at 28, 65–66, 123 (pro-Bork efforts to activate law enforcement community).

115. *The Tempting of America*, supra note 13, at 324.

116. During the controversy, however, Professor Kurland did make the argument that a solidly conservative bloc, or "critical mass," was something about which citizens

believing that the Bork Affair was a happily concluded "referendum" on unenumerated rights and *Griswold v. Connecticut*¹¹⁷ and thinking that it was conducted, in large measure, around issues that the case did not present.

B. *Market Conditions and Popular "Fronts"*

In other fields, there has long been recognition of the apparent inevitability of the development of contrasting styles of elite and popular discourse for the discussion of any number of serious and complicated matters.¹¹⁸ But this otherwise widely shared perception has made few inroads into contemporary academic legal circles. To the contrary, the reaction of constitutional scholars to the waning of the Warren Court has been, if anything, to retreat inward, to cultivate that abstruseness that Bork so accurately identifies. In this, one supposes, such scholars probably see themselves as pursuing the course—"confronting issues as intellectuals in our work"¹¹⁹—identified many years ago as possibly the most critical responsibility of progressive intellectuals attuned primarily to long-range goals. But, given that concern about the quality of contemporary political discourse is currently so widespread, even the law schools' recent fascination with "republicanism" as an alternative political model itself probably should be regarded with some skepticism. In its more sophisticated variations, in particular, this new "republicanism" may only represent the law schools' latest version of a widespread cultural phenomenon identified by Michael Walzer: the conscious or unconscious impulse, common to every type of professional intellectual, to speak differently in order to be seen to speak authoritatively.¹²⁰

should be concerned, even if that bloc did not constitute a majority. See Kurland, *supra* note 103, at 13. On the other hand, according to Bronner, the theme of the Court's "balance" may have been consciously avoided in light of poll findings that these arguments were little understood by the general public. See *Battle for Justice*, *supra* note 22, at 158; cf. L. Tribe, *God Save this Honorable Court* 35, 106–10 (1985) (suggesting that such a concern over "balance" is the critical factor in assessing Court nominations). Although it might be argued that Bork's forceful mind or personality would have added a catalytic, extra-mathematical dimension to his participation in such a "critical mass," neither of these theories does much to explain the difference in the reaction to the Bork and Kennedy nominations. Whoever replaced Justice Powell represented the same potential fourth or fifth vote on the same issues.

117. See Horowitz, *supra* note 6, at 655–57.

118. See, e.g., Hampshire, Spinoza and the Happy Few, *N.Y. Rev. Books*, May 17, 1990, at 40, 40 (discussing phenomenon of "dual language" in philosophy and theology). See generally K. Cmiel, *Democratic Eloquence: The Fight over Popular Speech in Nineteenth Century America* (1990) (examination of "The Democratic Idiom" and "Refined" versus "Colloquial" speech).

119. Mills, *The New Left*, in *The Unfinished Writings of C. Wright Mills: The Last Phase, Studies on the Left III* (I. Horowitz ed. 1963), quoted in C. Lasch, *The New Radicalism in America: The Intellectual as a Social Type, 1889–1963*, at 298–99 (1966).

120. M. Walzer, *supra* note 79, at 10.

And still, at its core, the law schools' version of "republicanism" nonetheless does focus on the right concerns. Unfortunately, however, several factors relating to the seemingly inevitable divergence between elite and popular discourse¹²¹ impose serious constraints upon the "republican" legal scholars' ability to realize their ideals, or even to contribute to their realization. Ironically, this may be particularly so when it comes to public issues arising in the constitutional scholars' own professional domain. First, and most easily transcended, are the cultural limitations imposed by the experience of contemporary legal scholarship itself, and most importantly those relating to the forum in which those scholars perform their work. Their prime expressive medium, the law school law review, has such a limited and specialized circulation that it is practically designed to foster a distanced interaction with the world, indeed even with the rest of the politically oriented intelligentsia. Because of its closed and self-referential vocabularies, the law review culture provides little if any guidance with respect to framing popular arguments.¹²² Moreover, the Supreme Court, toward which so much of this law review culture is oriented, has of late encouraged rather than helped to guard against such socially isolationist tendencies: with respect to the broader public, the current Court's lawyerly, "formulaic" opinion-writing style surely "does not so much move its readers as disqualify them."¹²³ As a consequence of this style, more and more attention is focused in politics and the media on the judicial

121. The reason that this divergence has not been sufficiently considered in the "republican" literature probably is related to the fact that the "republicans" have tended to focus their attention on "deliberation" in the judiciary and on how the judiciary can foster greater "deliberation" in the elected branches. See Michelman, *Law's Republic*, 97 *Yale L.J.* 1493, 1505-15 (1988) ("jurisgenesis" and "dialogic constitutionalism"); Michelman, *Traces of Self-Government*, 100 *Harv. L. Rev.* 4, 74 (1986) (Supreme Court's deliberations as possible model for active self-government); Sunstein, *Naked Preferences and the Constitution*, 84 *Colum. L. Rev.* 1689, 1699-1700 (1984) (heightened scrutiny may encourage greater deliberation on the part of Congress and state and local lawmakers); Sunstein, *Interest Groups in American Public Law*, 38 *Stan. L. Rev.* 29, 79 (1985) ("some of the deliberative tasks no longer performed by national representatives have been transferred to the courts"). Unlike other "republicans," see *supra* note 14, Professor Sunstein has recently appeared to broaden the focus of his concerns, as well as his intended audience. Cf. Sunstein, *Constitutional Politics and the Conservative Court*, 1 *Am. Prospect* 51, 60 (Spring 1990) (arguing that a conservative Court's retreat from "activism" "may have the healthy effect of requiring Congress, the President, and the states to deliberate on the important questions of self-government," thereby contributing to reinvigorated discourse).

122. See, e.g., Kahn, *Community in Contemporary Constitutional Theory*, 99 *Yale L.J.* 1, 3 (1989) (in the age of mass media, self-referential constitutional law scholarship less concerned with broad public communication).

123. R. Nagel, *Constitutional Cultures: The Mentality and Consequences of Judicial Review* 139 (1989). Somewhat like Bork, and unlike Professor Carter, see Carter, *supra* note 54, Professor Nagel sees an additional part of the problem as involving the fact that, increasingly, "the voice of the judge and the voice of the legal scholar converge," and that both of them exclude the general public from this important part of the public's own business. *Id.* at 131.

"bottom line," as the Court's discussion of serious public issues is increasingly framed in terms of esoteric, legalistic hurdles, prongs, and tests that nonspecialist members of the public can hardly be expected to care about or comprehend.¹²⁴

More basically, however, the simple reality is that even relatively plain-speaking constitutional theories are difficult to translate into popularized vocabularies in any way that retains the subtleties that make one different from the other. Once a strict historicist originalism is departed from (as even Bork himself concedes sometimes will be necessary), the justifications for all such departures are likely to sound indistinguishable in popular terms from popularized versions of most of the non-originalist ones. If, as *The Tempting of America* shows, even strict originalists like Robert Bork are saying that nonliteralism is sometimes justified, how else but in situationally specific terms are these different "sometimes" to be expressed? But asking the general public to keep situationally specific analyses separate from result-driven ones may be expecting a great deal. The constitutional "experts" in the law schools have little enough success in doing it themselves.

Moreover, if the relevant mass audience lacks experience with the reflective, balanced "methods or habits of 'constitutional thinking'" essential to "republicanism,"¹²⁵ that is not because a constitutional vernacular does not exist, but because a very specific one already does. For a quarter-century, the political Right has profited greatly from conducting exactly the sort of debased discourse it now belatedly condemns. Denigrating constitutional principles as mere "legal technicalities" has been a long-time campaign staple;¹²⁶ both before and after the Bork Affair, conservative candidates and polemicists have aggressively attacked liberals for being "soft on crime" and anti-"life." In the process they necessarily have conditioned the general public to link the outcomes in individual constitutional cases (say, deciding to apply the exclusionary rule) to broader positions on larger social policy concerns (e.g., "soft on crime"). It should not be surprising if the public is by now only receptive to (or, at a minimum, heavily predisposed toward) arguments based on such oversimplified vocabularies. Any attempt to create a genuinely "deliberative" discourse in such an atmosphere becomes an uphill battle once an extensive "history of such skewing . . . embeds those distortions in the public vocabulary."¹²⁷

124. *Id.* at 141.

125. Brest, *Further Beyond the Republican Revival*, 97 *Yale L.J.* 1628, 1630 (1988).

126. Nor has this reductionist tendency always been confined merely to the campaign trail: Justice Fortas was forced to defend against charges that the Warren Court was "soft on crime" during his nomination hearings in 1968. See Ross, *The Functions, Roles, and Duties of the Senate in the Supreme Court Appointment Process*, 28 *Wm. & Mary L. Rev.* 633, 676 (1987); see also *infra* note 138. See generally L. Baker, *Miranda: Crime, Law and Politics* 40-41 (1983) ("softness" on crime a campaign issue since 1964).

127. C. Condit, *supra* note 78, at 8.

But perhaps the most daunting and uncontrollable factor constraining the choice of tactics and vocabularies available to would-be "republicans" is technological: the ever-growing political power of television. As yet underexamined in legal academic discourse, television is a tool that permits political professionals on both sides of an issue to manipulate public discourse, by subtly invoking the pressures, habits, and particular communicative vocabularies that the medium fosters.¹²⁸ It has been widely noted that television may affect the citizenry's attention span and level of political participation—clichéd sound bites, and the political "fast-forward effect,"¹²⁹ demand quick-fixes to every problem. More importantly, and more subtly, however, television also may affect the very way we process and respond to the discussion of public matters—even at a relatively deep level, and even when the television set is off.

From *The People Rising* to *Ninth Justice*, all concerned agree that television was the critical medium of communication throughout the Bork Affair and that Bork's own testimony before the Judiciary Committee—especially as replayed in short excerpts on the evening news—was critical to the outcome.¹³⁰ As many will remember, and all but the hero-

128. See K. Jamieson, *Eloquence in an Electronic Age: The Transformation of Political Speechmaking* (1988) (television may have entirely altered the way the public perceives and processes political argument). Reflection upon the implications of television for legal scholarship and legal scholars is still at a very early stage. The most recent effort to consider these implications paints a very bleak picture of television's social impact indeed. See Collins & Skover, *The First Amendment in an Age of Paratroopers*, 68 Tex. L. Rev. 1087, 1090–93 (1990). Seeing our future as a choice between equally unattractive "Orwellian" and "Huxleyan" options, these authors appear to be working toward a major revision of first amendment principles in order to correct for TV's influence. A less apocalyptic view is Edward Rubin's comment on the Collins and Skover article, which questions whether the ideal of mass participation in deliberative discourse is worth attempting to attain, with or without television, in a society this vast. Rubin, *Television and the Experience of Citizenship*, 68 Tex. L. Rev. 1155, 1160–61 (1990).

The discussion here is not meant to suggest any form of technological determinism. More complex social processes that long predate the invention of television have also contributed to a "dulling of critical facilities" on the part of the public, and a debased political rhetoric. See, e.g., K. Cmiel, *supra* note 118, at 11, 259 (in nineteenth century, changing American attitudes toward business and social relations favored development of a more informal popular discourse).

129. A. Ranney, *Channels of Power: The Impact of Television on American Politics* 73 (1983). At the technical level, as is well known, the thirty-second spot ads to which Americans are accustomed are "ill equipped to build a convincing case for a nuanced position." K. Jamieson, *supra* note 128, at 10. Indeed, as one expert has told Congress, what one "can do best given thirty seconds [is] [c]reate doubt. Build fear. Exploit anxiety. Hit and run. . . . The 30 and 60 second commercials are ready made for the innuendo and half truth." Clean Campaign Act of 1985: Hearings Before the Senate Comm. on Commerce, Science, and Transportation, 99th Cong., 1st Sess. 54 (1985) (testimony of Charles Guggenheim). See *infra* notes 132–139 and accompanying text.

130. Nor was this unanticipated by the media and political advisors who set up and coordinated the Senate's hearings. They consciously manipulated the witness schedule,

worshipping authors of *Ninth Justice* probably will agree, the Robert Bork of 1987 came across as a highly fussy and contentious television witness. Unlike the Iran-Contra television hero Lieutenant Colonel Oliver North (who was much on the minds of all parties to the Bork Affair), academic and appellate lawyer Bork either never understood, or was unwilling to compromise with, the event in which he found himself involved. Waffling enough at crucial points to lend credibility to charges that he had suddenly experienced a "confirmation conversion,"¹³¹ he failed to establish a connection not only with the public but even with the supportive members of the Committee. And for coming across as what he was—an intelligent, nit-picking, analytically minded lawyer—he failed to win either the support or the affection of the broader public, and thereby lost all hope for confirmation.

But the value of a nominee's good "performance" was not the only television-related lesson of the Affair. What is probably a more typical example of television's potential significance for future mass-oriented constitutional disputes is to be found in one of the most controversial of all the anti-Bork coalition's efforts: its television commercial featuring film star Gregory Peck. The coalition members who composed the advertisement themselves candidly admitted that the commercial's major impact was visual (an "average" intact family standing before the impressive Court) and allusive (the appeal to credibility conveyed by the distinguished voice of a Hollywood elder statesman noted for his portrayals of serious and courageous characters on screen).¹³² In re-

for one thing, to attempt to bring pro-Bork witnesses to the table after the deadlines for the evening news had passed. See *The Tempting of America*, supra note 13, at 308; *Ninth Justice*, supra note 8, at 132, 145, 163. For another, they removed the dais on which the Senators sat, to make them appear more as peers to Bork than adversaries, so as to avoid repetition of the perceived television impact on the home audience of Iran-Contra witness Oliver North. *Battle for Justice*, supra note 22, at 210–11. The sensitivity to visual aspects of media coverage that emerged during the Bork nomination has persisted in more recent nominations. See, e.g., Berke, *Souter Anecdote: Off the Cuff or From the Script?*, N.Y. Times, Sept. 16, 1990, at 32, col. 1 (detailing controversy over camera angles for coverage of Souter nomination hearings).

131. *Battle for Justice*, supra note 22, at 241–60.

132. *The People Rising*, supra note 8, at 173. The authors of *The People Rising* find Garment's description of the Peck advertisement's "salient features" to be essentially accurate, quoting it in full:

The spot was narrated by Gregory Peck, whose screen image is one of rectitude and whose voice we all trust. "There's a special feeling of awe people get," intones Peck in the commercial, "when they visit the Supreme Court of the United States, the ultimate guardian of our liberties." As Peck speaks, a traditional four-person nuclear family, with faces we have rarely seen since "Leave It to Beaver," is walking up the Court steps. Father points the building out to the children. Peck goes on. Bork should not be on the Court, he says, "He defended poll taxes and literacy tests, which kept many Americans from voting. He opposed the civil rights law that ended 'whites only' signs at lunch counters. He doesn't believe the Constitution protects your right to privacy. And he thinks freedom of speech does not apply to literature and art and music." The

sponse to incessant and heated pro-Bork attacks on the Peck advertisement's accuracy, *The People Rising* expends considerable energy in an effort to prove, through line-by-line analysis of the commercial's artfully worded spoken text, that the commercial was not in fact misleading or unfair.¹³³ But the actual words included in its text are not what made the ad so important, as indeed *The People Rising*'s generally convincing line-by-line analysis tends only to confirm. What was genuinely controversial about the Peck advertisement was the way in which it drew television's special "associative grammar,"¹³⁴ based upon emotionally engaging "visuals," into popular constitutional discourse. The real importance of the Peck advertisement is that it focuses attention directly on the way in which television may tend to diminish the relevance of *any* spoken words within contemporary public discourse, to replace logic and causality with mere association.

To be sure, it is hardly novel to suggest that popular political discourse tends to rely upon emotionalism and symbolism; since the First World War (at least), such criticism has been widespread.¹³⁵ But still, as Susan Sontag pointed out some time ago, photographic media do introduce a novel factor into our public life; by their very nature, photographic media tend always to "democratize[] all evidence,"¹³⁶ making that which seems like evidence accessible to each viewer in a direct,

commercial ends with the family in profile, gazing reverently at the Court. A gentle wind blows through their hair. The camera focuses lovingly on the cherubic face of the youngest. The end.

Id., quoting Garment, *supra* note 65.

133. Id. at 265–66. Ronald Dworkin, though otherwise a strong Bork opponent, is less sure about the Peck advertisement's fairness. See Dworkin, *From Bork to Kennedy*, *supra* note 103, at 36 n.2 (Peck advertisement was misleading in failing to note a number of areas in which Bork had subsequently altered his positions). As noted, in responding to the Peck advertisement, Bork himself took a slightly different tack. See *supra* note 26.

134. K. Jamieson, *supra* note 128, at 14.

135. See, e.g., W. Lippmann, *Public Opinion* (1922) (lamenting breakdown in political communication in aftermath of experience with World War I propaganda); W. Lippmann, *The Phantom Public* (1925) (juxtaposing necessity of public participation in politics and randomness of public judgments in the face of party propaganda). The use of evocative imagery was hardly invented by the networks. Cf. K. Burke, *A Rhetoric of Motives* 86–87 (1950) ("[I]f the image employs the full resources of imagination, it will not represent merely one idea, but will contain a whole bundle of principles, even ones that would be mutually contradictory if reduced to their purely ideational equivalents.").

136. S. Sontag, *On Photography* 75 (1977). According to Sontag, this "democratization" of evidence is a result of the media's tendency to induce an ironic attitude toward the world in general. Id. at 149. Others have argued that this tendency is enhanced by the propensity of television news to decontextualize information—to reduce the world to discontinuous, bite-size pieces, in which the most serious national and world events, after a "discussion" lasting seconds, are then followed by a "Now . . . This" break. N. Postman, *Amusing Ourselves to Death: Public Discourse in the Age of Show Business* 99–105 (1985). An analysis of network news broadcasts during the 1968 and 1988 presidential campaigns has found that even the individual "sound bite" itself has shrunk dramatically in the last two decades—from 42.3 seconds in 1968, to 9.8 seconds in 1988—while "the time the networks devoted to visuals of the candidates,

nonrational, and unmediated way. As if with "the authority of a document,"¹³⁷ such media therefore seriously undermine the "parceling out of the truth into relative truths"¹³⁸ that is central to (and, indeed, the purpose of) meaningful political argument. And the television medium's deep association with a celebrity-oriented entertainment culture only reinforces such powerful inherent tendencies. The Right thus became enraged by the Gregory Peck commercial not just because the commercial allegedly was "false," but because they knew, from past experience, that its impressionistic "grammar" would be impossible to combat except through responses framed in kind. They knew that the Peck advertisement worked not by charges and arguments at all, but by trading upon patriotic visual imagery and Peck's personal appeal. They knew that the Peck advertisement placed on them the burden of showing that their intricate, verbally dense arguments about textual and historical interpretation were more important than this direct appeal to feelings of reverence for the Court. And they knew how impossible it was for them to meet this burden, since all of us still seem to "lack a grammar to test whether a visual assertion can function as argument," leaving all of us "vulnerable to its use as a substitute" for reasoned judgment.¹³⁹

Moreover, television's implications for "republicanism" are not limited merely to the tendency of visual images to diminish the relative significance of words. Television also affects how one chooses words when words are what one must use; it favors not just compressed "sound bites," but particular *types* of sound bites. Robert Bork's disastrous experience using complicated abstract arguments to answer questions from the Senators only draws attention to the way in which television privileges other styles of verbal communication. In particular, television tends to favor a communication style that proceeds through reference to shorthand verbal "snapshots"¹⁴⁰—"arguments"

unaccompanied by their words, increased by more than 300 percent." Adatto, *The Incredible Shrinking Sound Bite*, *The New Republic*, May 28, 1990, at 20.

137. S. Sontag, *supra* note 136, at 74.

138. *Id.* at 106. Visual imagery has, indeed, an even darker side, as it allows anti-"republicans" to send coded hints (say, an appeal to the audience's racial feelings) that no contemporary public advocate would ever voice out loud. The notorious "Willie Horton" advertisement, produced by an independent group supporting the 1988 Bush-Quayle campaign, illustrates this point. See Estrich, *The Hidden Politics of Race*, *Wash. Post*, Apr. 23, 1989 (Magazine), at 20 (describing use of racial fear as part of the 1988 presidential campaign, through the independently produced Horton advertisement).

139. K. Jamieson, *supra* note 128, at 14.

140. *Id.* at 114. According to one of the acknowledged political masters of the medium, "television changed the rules." R. Ailes, *You Are the Message* 12 (1988). Consequently, "if speakers can paint word pictures, as opposed to just using words," Ailes advises, "or can use emotionally charged, intriguing words, they'll be more interesting" in a medium the viewer associates with entertainment. *Id.* at 13; see also N. Postman, *supra* note 136, at 100 ("news without context" becomes in such a medium "news as entertainment").

that derive their power from the way in which the words in which they are expressed call to mind shared *visual* images familiar from widely circulated photographs, or television news, or film. It thus is neither trivial nor accidental, according to close students of this subject, that our most successful recent politicians have shown such a proclivity for conjuring up inchoate pictures from the visual media: the famous Hollywood bomber pilot going down in a speech on defense policy; the hero pulling victims from a Potomac River air crash to illustrate American values in a State of the Union speech; the stereotypical tough guy saying "Read my lips" or "Make my day."¹⁴¹ Although the fact that the Bork Affair happened to have been a judicial appointment controversy may have added some special wrinkles, given television's special tendency to foster a celebrity/entertainment reaction by a viewer,¹⁴² Bork's sad experience playing lawyer in the witness chair powerfully suggests the limitations on "republicanism" that the medium may impose when other sorts of constitutional disputes are to be set before the general public. Result-oriented "stories" will always play better than intricate explications of text, principle, and history on such occasions. And whether the "artificially narrow lens of legal scholarship,"¹⁴³ so frequently based on the drawing of fine analytical distinctions, can ever be effectively translated into television's "snapshot" grammar without severe compromises is therefore open to real doubt.

Because "one picture is potentially a thousand *different* words,"¹⁴⁴ television's vague "associative grammar" is likely to remain more powerful than closely reasoned argumentation whenever constitutional discourse includes the general public for another very practical reason: its vagueness is so plainly useful for building coalitions among segments of society whose concrete interests may not be the same. That is what

141. K. Jamieson, *supra* note 128, at 118-64. Jamieson provides brilliantly insightful illustrations of these points through careful analyses of the public statements of the "Great Communicator," President Ronald Reagan. The power of his statements, she shows, lay precisely in their unpretentiousness, their resemblance to ordinary speech, and the way in which such ordinary speech could be used to transform easily accessible "snapshots" from "real"—i.e., television or movie—life into political positions. It thus is hardly a coincidence that the most celebrated speechwriter of the 1980s, Peggy Noonan, was a former radio broadcast writer, specializing in a "conversational" style. P. Noonan, *What I Saw at the Revolution: A Political Life in the Reagan Era* 18 (1990).

142. "[Y]ou cannot televise an entire political party but you can televise an individual candidate," one close study of the issue has asserted, by trading upon the seemingly intimate atmosphere created by having that figure visiting in one's living room. J. Abramson, F. Arterton & G. Orren, *The Electronic Commonwealth: The Impact of New Media Technologies on Democratic Politics* 17 (1988). Thus, Bork may have been particularly at risk in the television age because a confirmation proceeding by its very nature may tend more than other instances of constitutional politics to play into television's tendency to personalize public issues.

143. C. Condit, *supra* note 78, at 96.

144. *Id.* at 81.

(or at least part of what) symbolic discourse has always been about. A side effect of television's likely increased use is that equivalent "ideographic"¹⁴⁵ verbal terms like "pro-choice," "pro-life," "quotas," "judicial activism"—and the "ideographically" brilliant "out of the mainstream" and "confirmation conversion"—will become more and more a practical necessity whenever more "deliberative" discussion is even attempted beyond an elite audience. In the darkest view, increasingly hysterical and emotionally evocative verbal and visual imagery may indeed be on the way to becoming a sheer necessity to activate the public at all, even if invoking it only reinforces in the long run the vicious circle that necessitates the resort to such tactics in any particular case. The vicious circle likely will intensify for other reasons too, as it comes to matter more and more, for reasons entirely unrelated to "republican" persuasion,¹⁴⁶ that one's cause be represented on television if it is to be considered politically significant.¹⁴⁷

Finding in their polling that most Americans enjoyed their "privacy" and believed that settled civil rights issues should not be reopened,¹⁴⁸ Bork's opponents found it irresistible to engage in emotion-laden appeals directed at those concerns, framed in the same broad policy-oriented terms that the Right had long been using. The public audience was long conditioned to hear, and therefore to believe, that a narrow ruling about whether a particular company's employment policy violated the Occupational Safety and Health Act meant that Bork approved of mandatory sterilization.¹⁴⁹ And because so many of Bork's positions, and so much more of his judicial record, turned upon such legal niceties—the distinction between intermediate and rational review in sex discrimination cases;¹⁵⁰ the actual arguing or nonarguing of

145. *Id.* at 59.

146. As Paul Brest and many others have noted, the end result is a "consumer," not a "commonwealth" democracy, in which scientifically reliable marketing techniques can substitute for discussion, and "ideographic" messages can through them be tailored with precision to what it is known in advance will sell. Brest, *supra* note 70, at 185.

147. Bronner notes the statement of David Kusnet, Vice President of People for the American Way: "'[Y]ou really don't exist in this country unless you're on TV.'" Battle for Justice, *supra* note 22, at 149; see also P. Noonan, *supra* note 141, at 137 ("it isn't real unless it's ratified, and television is the ratifier").

148. See Battle for Justice, *supra* note 22, at 159–60, 289–90; Ninth Justice, *supra* note 8, at 211, 251–52; The People Rising, *supra* note 8, at 137–38. Interestingly, *The People Rising* notes that while Americans enjoyed what constitutional scholars conceptualize as "privacy," the theme was "obtuse and limited in its potential for broad based communication." *Id.* at 137. Appeals to such values had to be made "'clear, simple, and direct'"—talking about birth control and sterilization, not "privacy." *Id.*

149. See *supra* note 108.

150. See Battle for Justice, *supra* note 22, at 253–54. In *The Tempting of America*, Bork claims that his position is akin to that set forth by Justice Stevens in *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 453–54 (1985) (Stevens, J., concurring). *The Tempting of America*, *supra* note 13, at 330. Bork claims that this standard "would produce doctrine relating to distinctions between the sexes quite similar to current doctrine." *Id.* Bronner reports, however, that this line of analysis was an

racial discrimination claims in challenges to literacy tests and poll taxes;¹⁵¹ the need to make new law regarding the constitutional status of parent-child relationships following divorce, given the posture of a particular appeal¹⁵²—he was especially vulnerable to such charges. Like Michael Dukakis afterward, Bork found that once broad charges have been made it is almost impossible to refute them in the television era through resort to a technical lawyerly vocabulary.¹⁵³ Attempts to draw distinctions between form and substance—between procedure, principle, and result—inevitably came across on both occasions as efforts at evasion, as attempts to conceal where one really stood on the underlying issue. And yet, unfortunately, it is precisely on the ability to convey the importance of such lawyerly distinctions to a mass and general audience in rational deliberative terms that the hopes of contemporary “republicans” must ultimately rest.

The lesson of the Bork Affair, therefore, is that there most likely is a need for would-be “republicans” to trim or readjust their goals—and, as Professor Tushnet suggests,¹⁵⁴ to take a more modest view of their own relevance. No form of “republicanism” at a popular level is likely to be built by writing for the law reviews, which no significant segment of the public, or even of opinion-makers, will ever read. Creating “the methods and habits of ‘constitutional thinking’”¹⁵⁵ almost certainly means actively reaching out beyond the law reviews and beyond the technicalities. Perhaps the most that law school “republicans” can do is attempt to develop intellectually legitimate versions of what C.M. Condit, in her brilliant analysis of the history of abortion rhetoric, calls

“artifice” cobbled together by persons other than Bork during preparation of a Justice Department report supporting Bork’s nomination, and that the Report was devoid of citations to Bork’s previous work to support this theory for the simple reason that Bork had never previously said anything to suggest that he supported it. *Battle for Justice*, supra note 22, at 254–55.

151. In *The Tempting of America*, Bork claims that his criticism of *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966), and *Katzenbach v. Morgan*, 384 U.S. 641 (1966), turned upon the fact that race discrimination was not alleged in the first case and that he disagreed with the Court’s reading of Congressional power under § 5 of the fourteenth amendment in the latter. *The Tempting of America*, supra note 13, at 324–25.

152. *Franz v. United States*, 712 F.2d 1428 (D.C. Cir. 1983).

153. *Battle for Justice*, supra note 22, at 153.

154. Tushnet, supra note 69, at 81 (“There may indeed be no distinctive contribution that legal scholars can make to the creation of an informed and principled electorate.”). Indeed, in Tushnet’s view, excessive participation by legal academics in our constitutional politics may even be slightly harmful. The paradoxical reason is that if one takes a “strongly democratic” view of the Constitution itself, as he does, the scholars’ attempts to participate in popular constitutional discourse will almost surely take the form of their making legalistic arguments about what the Constitution does or does not “allow,” which in effect at least partially undermines the very notion that the Constitution is pervasively democratic and popular. Tushnet, supra note 69, at 80–81.

155. Brest, supra note 19, at 1628.

socially persuasive “heritage tales”¹⁵⁶—“tales” that illuminate the history and long-term guiding principles of the Constitution and the Court. Such tales may, perhaps, elevate the general level of our discourse, even if these background stories will sometimes partake of social myth as well as social fact.¹⁵⁷ They at least may serve to set the stage for more compelling and accurate “ideographs” for use in future crises.¹⁵⁸ As *The Tempting of America* itself makes clear, the problems of oversimplification, posturing, and distortion are here to stay. For better or for worse, future high moments of constitutional politics are more likely to resemble the Bork Affair than to be different from it, with respect, *at least*, to the means by which constitutional ideas are articulated.

Although Senator Hatch has charged that, in the Bork Affair, progressive legal scholars “were easily manipulated by the special interest lobbying groups” which made support of their efforts “a litmus test of loyalty to their causes,”¹⁵⁹ this is in all likelihood yet another of the Bork Affair’s half-truths. In such constitutional controversies, legal scholars *are* a “special interest” all their own. As such, it is their fate—indeed, it is precisely their socially distinguishing special interest—to be dramatically more concerned than most Americans with the substance and argumentative nuance of these issues. Inside their “special interest” culture, professional constitutional scholars inevitably will also experience pressures and constraints peculiar to their positions and ambitions, and different from those experienced by Senators, nominees, organizers, and the general public. Because Robert Bork was the most prominent member of the constitutional theory subculture since Felix Frankfurter to be nominated to the Court, his nomination was inevitably destined to become a signal moment for members of that culture—a moment when ordinary politics had the nerve to insert itself in the constitutional scholars’ previously self-enclosed domain. It is not surprising, therefore, how deeply legal scholars became involved in the Bork nomination process. Nor is it surprising that they actively and tacitly supported even the most questionable efforts of the politicians and the interest groups, in order to prevent the confirmation of a High Court nominee whose theories so many of them found professionally unacceptable.

More problematic is what happened next: the way in which the progressive academic lawyers continued in lockstep with those same

156. C. Condit, *supra* note 78, at 43. Condit’s notion is that social change is communicated, in part, through the construction of “reform narratives.” *Id.*

157. *Id.* at 35.

158. Professor Ackerman’s idea of “constitutional moments” may, for example, be one good basis for constructing such future “heritage tales.” Ackerman, *supra* note 41, at 1022. There is at least some evidence that this idea is catching on. Cf. E. Chemerinsky, *The Constitution is Not “Hard Law,”* 6 Const. Commentary 29, 35–37 (1989) (Bork Affair as “‘constitutional moment’”).

159. Hatch, *supra* note 73, at 38.

politicians and groups once short-term political considerations irrelevant to scholars—the fear of political failure, of wearing out a welcome with a tired public—caused their professional politician allies subsequently to “play[] patty cake”¹⁶⁰ with nominee Anthony M. Kennedy. After having turned a blind eye to result-oriented public discourse when that seemed useful for defeating Bork, the scholars now suddenly foreswore it. The elites went on to other issues, and the people were left with a different Reagan Justice, with a voting record virtually indistinguishable from what might have been expected from a Justice Bork.

III. THE SCHOLARS AND THE INTERESTS

If “[i]t is difficult to exaggerate the width of the gap between the virtues of a political commentator and theorist on one side and the virtues of someone actually exercising power . . . on the other,”¹⁶¹ the legal scholars opposing Bork put themselves precisely in the position of trying to play both roles. And, as with Bork’s supporters, the strong feelings elicited by Bork’s personality, and the emotional dynamics unleashed by this unaccustomedly intense political competition, led them to confuse the issue with the man. As they argued over and over that Bork was “outside the mainstream,” they became, like Bork himself in *The Tempting of America*, prisoners of their own rhetoric. Bork originally was opposed because his appointment would upset the High Court’s “balance”¹⁶²—because he would alter too dramatically its perceived middle of the road political position. But as the campaign progressed, issues of the highest politics were gradually transformed into issues of personality and rhetorical approach. “Balance” came to be a matter of presentation—and self-presentation—rather than of political effect. Once the issue was thus transformed, Anthony M. Kennedy—ininitely more demure than Bork in temperament, and demonstrably more restrained in the style of his jurisprudence—was easily confirmed, and without scholarly opposition.

In the fall of 1987, therefore, the personalizing and sloganeering tendencies of mass politics did not affect just Robert Bork. To the contrary, direct and indirect engagement in Bork-related politicking exposed many legal scholars to the potential for miscalculation, self-

160. H. Schwartz, *Packing the Courts* 149 (1988) (quoting Joseph Rauh). Subsequently, other participants in the Bork confirmation controversy have continued to be aware of its possible adverse consequences on their institutional interests, and, at least according to some, may have altered their behaviour in order to protect these interests. See Lewis, *Bar Group Gives Souter Top Rating*, N.Y. Times, Sept. 5, 1990, at A1, col. 1 (speculating that ABA decision to revoke its pro-choice resolution may have arisen from desire to protect its special role in the confirmation process).

161. S. Hampshire, *Innocence and Experience* 171 (1989); see also J. Beiner, *Political Judgment* 160 (1983) (ineradicable disjunction between “prudential judgment (the judgment of the involved participant) and spectator judgment (the judgment of one who stands back and reflects)”).

162. See L. Tribe, *supra* note 116, at 106.

delusion, and emotionalism that inevitably characterizes such efforts. In retrospect, two overlapping issues of continuing significance stand out. First, the legal scholars' collaboration with the interest groups during the Bork nomination controversy raises questions concerning the outer limits of the legal scholar's obligation to speak only "truth."¹⁶³ Second, the withdrawal of the legal scholars from the Kennedy confirmation process raises questions concerning the proper relationship between scholars and the individual or institutional representatives of political movements with which they are in sympathy. In the wake of the Affair, some reflection on these intersecting tensions may be valuable, even if such collective introspection ultimately provides something quite the opposite of one "right answer," or any tidy definition of what should pass for scholarly "civic virtue" in an age of constitutional politics.

A. *Ivory Towers and Dirty Hands*

In the conventional mythology, at least, the intellectual has been thought of as a "person whose relationship to society is defined . . . principally by his presumed capacity to comment upon it with greater detachment than those more directly caught up in the practical business of . . . power."¹⁶⁴ If so, all involvement of university-based intellectuals in the potentially self-serving, self-deluded world of hard-fought democratic politics holds the serious risk of compromising the

163. Obviously, to invoke so casually a large word like "truth," as is done throughout the remainder of this section, is to use a tremendously problematic term rather loosely. Perhaps surprisingly, doing so seems to be rather common in the relevant literature. See, e.g., H. Arendt, *Truth and Politics in Between Past and Future* (1968); Kronman, *Legal Scholarship and Moral Education*, 90 *Yale L.J.* 955, 960-63 (1981). Here, "truth" is used merely to denote candid, information-providing statements that are at least intended fairly to set forth the relevant context, to outline potential consequences, and to give due weight to (and adequate account of) interpretations differing from the speaker's own. The present distinction, therefore, is less between truth and "falsehood" than between truth and what Arendt calls speech "actions," political statements intended to shade the record and help build a case. H. Arendt, *supra*, at 249; see also Shapiro, *In Defense of Judicial Candor*, 100 *Harv. L. Rev.* 731, 732 (1987) (candor means not being indifferent as to whether the listener or reader is deceived). Naturally, such "speech acts" can and do include the adoption of an unattainable "objectivity" or "neutrality" as one's pose. See *supra* note 103 (Dworkin & Kurland on Bork). As Dean Calabresi has pointed out, various forms of fiction and subterfuge have long been part of the traditional lawyerly, even judicial, repertoire. G. Calabresi, *A Common Law for the Age of Statutes* 172-73 (1982).

There is good reason to believe that not even the most careful students of truth and falsehood in public life have done full justice to the immense gray area that may lie between them. See, e.g., S. Bok, *Lying: Moral Choice in Public and Private Life* (1978). Compare B. Moyers, *The Secret Government* 60 (1988) (former Attorney General John Mitchell on the distinction between lying and "not volunteering") with *id.* at 61 (former Assistant Secretary of State Elliott Abrams on the distinction between "a deliberative effort to leave . . . a misleading impression" and "duck[ing] a question").

164. C. Lasch, *supra* note 119, at ix.

scholarly identity. Just as it was possible in the 1960s for progressive academics to confuse the interests of a particular Administration with other long-term values,¹⁶⁵ so now is there an analogous temptation to confuse attractive long-term values with the behavior of particular special interest groups—or with the needs of particular opposition politicians. The potential for such seductions is widespread; the dynamics, and the detachment-compromising risks, relatively content-neutral.

That academic lawyers have in fact long inhabited a slightly different social role from that attributed by Lasch to intellectuals in general only makes their particular dilemma worse. For the legal scholar, it is the very essence of the *scholarly* job to consider rather concretely how public and private power should be exercised: to criticize *as a scholar* contemporary public figures and institutions, assuming a direct responsibility “to improve the world” by teaching power-wielding judges “lessons.”¹⁶⁶ Legal scholars are, moreover, “intellectual schizophrenics”¹⁶⁷ even in the daily experience of their vocation: supposedly devoted to the discovery of truth in their scholarship,¹⁶⁸ they simultaneously must “train[] Hessians”¹⁶⁹ to lubricate the wheels of commerce for the highest bidder—although the actual teaching of such manipulative argumentation may breed a carelessness about the same truth their scholarship is supposedly discovering.¹⁷⁰ Worse, they are expected to perform this “schizophrenic” job in the context of a larger professional culture whose norms not only privilege manipulation on behalf of clients (and, indeed, seem often to condone the manipulation *of* clients, too), but which also seem almost to endorse deception, at least outside of court.¹⁷¹ One need not believe blindly in the notion of objective truth to appreciate the psychological, moral, and political dif-

165. See generally D. Halberstam, *The Best and the Brightest* (1969) (recounting role of elite intellectuals as architects of the Vietnam War); see also C. Forcey, *The Crossroads of Liberalism* (1961) (similar compromises by intellectuals attracted to Woodrow Wilson and Theodore Roosevelt).

166. See Shapiro, *supra* note 163, at 731. Their attempts to do so may, of course, only cause judges to denounce them as “scholastic mandarins.” Wright, Professor Bickel, *The Scholarly Tradition, and the Supreme Court*, 84 Harv. L. Rev. 769, 777 (1971).

167. J. Auerbach, *Unequal Justice: Lawyers and Social Change in Modern America* 90 (1976) (quoting Bergin, *The Law Teacher: A Man Divided Against Himself*, 54 Va. L. Rev. 637, 638 (1968)).

168. See Kronman, *Foreword: Legal Scholarship and Moral Education*, 90 Yale L.J. 955, 967 (1981). For a more extensive meditation on the relationship between “professing” law and adhering to personal political beliefs, see S. Levinson, *Constitutional Faith* 170–78 (1988).

169. J. Auerbach, *supra* note 167, at 90 (quoting Bergin, *supra* note 167).

170. Kronman, *supra* note 168, at 965.

171. While the rules technically counsel “Truthfulness in Statements to Others,” Model Rules of Professional Conduct Rule 4.1, the tendency, even in the law review literature, is to come to terms with the fact that, at a very minimum, “mislead[ing] an opponent” in negotiations is generally thought to be professionally acceptable. See Rubin, *A Causerie on Lawyers’ Ethics in Negotiation*, 35 La. L. Rev. 577, 586 (1975);

ficulties of maintaining under such conditions any strong distinction between knowledge and conviction, between detachment and engagement, or between benevolent paternalism and selfish mass manipulation.

Further complicating matters is the fact that even the most traditional conception of the law professor's role has included an ethic of "public service," paid lip service even in law school promotion and tenure standards. In practice, this public service notion has largely been defined by undertakings that are both uncontroversial and role-intense in nature: bar association work, formal government service, legislative testimony, representing the occasional celebrated or unpopular client—and even that within the highly structured framework of pro bono litigation.¹⁷² Whether any of this experience is helpful in determining the proper role to play in mass, media-oriented disputes is an open question. The frequently divided, two-tier law school faculty structure, which distinguishes between clinical and "regular" faculty, only insulates the strictly classroom portion of the faculty from the incentive and the necessity of engaging even in such role-intensive "politics."

Within the discourse of legal scholarship, unfortunately, the question of the part that legal scholars should play in mass political activity hardly has been raised. At most, previous discussions of the conflicts latent in the legal scholar's function have focused only upon half of the question, and then only by analogy: the standards of truthfulness and candor that should apply to what a scholar says once a decision has been made to engage in mass politics, not on when the scholar ought to engage in such activity in the first place. Most typically, such discussions have focused on the relationship between scholarship and politics only with respect to what the scholar ought to say in the pages of the scholarship itself.¹⁷³ Yet here the fact that legal scholarship has increasingly become more normative—that activist political agendas, Left and Right, have become intertwined with even the performance of the academic lawyers' strictly scholarly pursuits—hurts more than it helps. As that scholarship becomes ever more free-wheeling, questions concerning the candor or sincerity of the views expressed in it tend to

White, Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation, 1980 Am. B. Found. Res. J. 926, 928.

172. Paradoxically, because of these role-related considerations, the more directly the scholar becomes involved in mass politics—as campaign operative or behind-the-scenes advisor—the less problematical the moral and ethical issues discussed here may become. Every citizen has a right to become involved in politics, including academics. The problems examined here arise when that involvement takes the form of publicly trading upon the scholarly identity—attempting to use the scholar's special status as a scholar as a political lever. See *supra* note 16.

173. Cf. Kahn, *supra* note 122, at 3 (many discussions among constitutional theorists of possible law-legitimizing "communities" do not contemplate communication with the mass public).

be underemphasized,¹⁷⁴ even though such questions are central to developing a sensibility appropriate to the principled practice of real-world politics.¹⁷⁵ The otherwise liberating normative trend in legal scholarship may thus only worsen the difficulties facing legal scholars when mass-action in the real world is contemplated. Liberation from restraints of content and of form, however healthy generally, still also may create bad habits: a tendency to confuse socially relevant truth with personal sincerity, to replace socially responsible context-setting with argument manipulation, to ignore practical effectiveness in favor of the pleasures of self-expression. Such vast personal autonomy, in short, may well foster a habit of self-indulgence that, in politics, may make legal scholars dangerous to themselves and others, not to mention ethically uninformed.

Given such a background, the widely accepted notion, as Bork puts it, that "much of constitutional law has in fact been political," becomes in practice precisely the type of "little" knowledge whose possession may prove perilous. It provides no concrete guide to action, even inside the classroom, let alone a sense of the longer-term structural and social values that might be implicated in the practice of constitutional politics. And it is no help at all in sorting out the legal scholar's proper role on particular occasions. Whatever its worth inside the legal academy, Dean Carrington's controversial notion that "romantic innocence" might be desirable¹⁷⁶ is decidedly unhelpful when it comes to shaping a code of ethical behavior for political action in the larger world. "Romantic innocence" about the real-world consequences of doing or not doing, or of the potential moral compromises any of several possible courses may involve, is the last thing that one needs. In an

174. But cf. Delgado, *Mindset and Metaphor*, 103 Harv. L. Rev. 1872, 1874 (1990) (alleging insincerity on the part of Professor Randall Kennedy in the "Racial Critiques" debate). Although Professor Kennedy took pains to measure and modulate his critique so as to engender a "deliberative" discourse concerning the value of the new scholarship of "voices," *Racial Critiques of Legal Academia*, 102 Harv. L. Rev. 1745, 1810-19 (1989), he has been subjected in response to a firestorm of *ad hominem* denunciation. See Brewer, *Introduction: Choosing Sides in the Racial Critiques Debate*, 103 Harv. L. Rev. 1844, 1845-46 (1990) (reviewing this criticism). Ironically, as Professor Minow has pointed out, the possibility that there might have been an absence of criticism such as Kennedy's probably ought to have worried his opponents more than anything he said, for "[t]o be taken seriously in the business of law and legal scholarship means becoming the subject of sustained criticism." Minow, *Beyond Universality*, in *Feminism in the Law: Theory, Practice and Criticism*, 1989 U. Chi. Legal F. 115, 116.

175. See Shapiro, *supra* note 163 (examining pressures on judges to bend the truth).

176. Carrington, *Of Law and the River*, 34 J. Legal Educ. 222, 227-28 (1984). To the contrary, since the political world is so rank with posturing, deception, and misrepresentation, the need often will be great for someone who is committed, more than anything, to the telling of unpleasant, "demystifying truths" even when the ones the "truth" embarrasses are one's friends. Letters from Robert W. Gordon to Paul D. Carrington, reprinted in "Of Law and the River," and of *Nihilism and Academic Freedom*, 35 J. Legal Educ. 1, 1-9, 13-16 (1985).

effort to minimize some of Bork's more provocative nonjudicial writings, one of Bork's supporters at the Hearings testified that "there is little role for practicality and judgment in academics."¹⁷⁷ But even he acknowledged that in judging—as in politics—different rules apply.¹⁷⁸

The very concrete issues of political ethics raised for legal scholars by the Bork Affair are not to be disposed of just by having "meant well" or by having had what one believes are noble goals. Only the most self-deluded will contend that the parties to the Bork Affair were engaged in any kind of bland "public service" function; they were engaged in active democratic citizenship. And they were not, like storybook "republicans," trying merely to "persuade" their fellow citizens; they were engaged in a large-scale effort to manipulate and to control events. Little comfort can be taken from the fact that in the Bork Affair, activist scholars may have meant to exercise such control as they obtained in the public's own best interest—unless republican "civic virtue" is to be taken merely as a synonym for paternalism.

To be sure, a certain degree of paternalism by any scholarly elite may be inevitable when that elite becomes involved in public life¹⁷⁹ because the manipulation of (superior) information is one of the major operational forms that paternalism always takes.¹⁸⁰ Yet such ineradicable paternalism will also always be nearly indistinguishable from anti-"republican" behavior—from trading upon people's ignorance, allowing them to make "right" decisions for "wrong" reasons, or not informing them that a decision concerning their best interests in fact is being made, because the elite already has decided, for reasons of its own, that the probable outcome is acceptable. Though some have argued that paternalism may be more justified if the good paternalist takes special care to understand what the alleged beneficiaries would really want if they understood their choices,¹⁸¹ it does not therefore follow that polling, and subsequently pandering, are what the good "republican" paternalist should have in mind if his or her commitment to democracy is serious. Nor does it follow that sitting out the fray, allowing decisions to be made without a fully educated citizenry's participation—paternalism, that is, by omission—is any more "republican."

Devotion to a true democracy, or a true "republic," surely means believing that the people are entitled to full and fair information, and

177. Bork Hearings, *supra* note 16, at 2441–42 (testimony of Professor George Priest).

178. See Cover, *Violence and the Word*, 95 *Yale L.J.* 1601, 1628 (1986) (whatever else it is, law in practice is concerned with the "social organization of violence").

179. Dworkin, *Paternalism*, in *Philosophy, Politics and Society* 94 (P. Laslett & J. Fishkin eds. 1979).

180. See D. Thompson, *Political Ethics and Public Office* 152 (1987) ("deception . . . is likely to constrain action when practiced by persons or institutions who act from positions of superior power or prestige").

181. *Id.* at 158.

that they are to be given the responsibility for living with the consequences of their decisions. As Senator Warren Rudman said during the Iran-Contra hearings, democracy presupposes that "the American people have the constitutional right to be wrong"¹⁸²—what David Luban calls the "own-mistakes principle."¹⁸³ If the people needed to know, albeit "ideographically," that confirming Robert Bork as Justice would produce certain constitutional outcomes, they were equally entitled to be informed that confirming Justice Kennedy would bring about the same results. This is true even if, indeed especially if, in the case of Kennedy, creating the necessary ideographs would have been a harder and more lonely mission. Taking such nonconforming stands when there exists a democratic need is the least that the practice of constitutional politics requires of legal scholars who choose to become involved. This obligation does not vary depending upon whether one enters the arena from the Right or from the Left.

If there is any kind of "republican" distinction between candor and paternalism, between scholarly speech and political speech, breaching it even once converts the question of doing so again from one of principle to one of prudence, a prudence exercised, if only by default, every time one does or does not become engaged. The likelihood of success, the dispositions of one's potential allies, the possibility that long-range ambitions, personal and group, might suffer, the competing demands of other portions of one's life or calling—all these factors will necessarily and legitimately inform every decision to sacrifice scholarly detachment for intense engagement in constitutional politics designed to help achieve short-term results. In particularly difficult and fast-moving situations, like the Kennedy-for-Bork exchange in the chaotic fall of 1987, ordinary human emotions will also inevitably play a role: emotionally based "rebound" or "boomerang" effects—impulses to re-engage compulsively, and precipitously to withdraw—appear common to many sorts of intense political endeavor.¹⁸⁴

But if the scholars had serious and substantial reasons for failing to speak out against the nomination of Judge Kennedy, the factors counseling involvement were serious and substantial, too, and most serious

182. Joint Hearings on the Iran-Contra Investigation, 100th Cong., 1st Sess. 127 (July 13, 1987) (statement of Sen. Rudman, Vice Chair of the Senate Select Committee on Secret Military Assistance to Iran and the Nicaraguan Opposition). In this, Rudman of course is echoing the views of an earlier American "republican" who said: "I know no safe depository of the ultimate powers of the society but the people themselves; and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them, but to inform their discretion by education." T. Jefferson, Letter to William C. Jarvis, Sept. 28, 1820 in *The Writings of Thomas Jefferson* 278 (A. Bergh ed. 1907).

183. D. Luban, *Lawyers and Justice: An Ethical Study* 344 (1988).

184. Hirschman, *Shifting Involvements: Private Interest and Public Action* 80 (1982). As Hirschman points out, the emotional aspect of political commitment can produce either result, for equally rational (or irrational) reasons. *Id.* at 100–01.

of all was the fact that both nominations concerned the same stakes. The professional politicians may have had good reasons for "playing patty cake" with Kennedy—a desire not to be too far out of step with the latest public mood, not to seem overly extreme, not to expend political capital on what was sure to be a losing effort. But it does not follow that progressive legal scholars should have shared, or abided by, these impulses. Ironically, as it turns out, even many of the interest groups who went along with the politicians' silence back in 1987 have themselves since had embarrassing second thoughts about whether having done so made long-term sense.¹⁸⁵

If errors were made in the reading of Kennedy's pre-Court record—if his appointment was mistakenly considered to be less threatening to many important values than it ultimately turned out to be—the authors of *Ninth Justice* strongly doubt that these mistakes were honest ones, unconnected with the professors' own desires, individual and collective,¹⁸⁶ for self-rehabilitation following their loss of seemliness during the Bork campaign. *Ninth Justice* sees the scholars' silence, rather, as an attempt to appease the enemies that their activities with respect to Bork had earned them and to restore their public image. These same authors say—and the subsequent Supreme Court record, if nothing else, surely tends to bear them out—that careful scrutiny of Kennedy's preappointment record disclosed clearly that he would be, in effect if not in academic theory, the practical equivalent of a Bork.¹⁸⁷ But if practically minded members of the Right knew almost at once what a Kennedy confirmation actually would mean, more progressive scholars may wish to wonder why they did not, and did not speak up about it. An overly close association with tactically minded professional politicians, concerned with "looking like a winner" rather than with actually being one, has to be a leading suspect. And a willingness to use the public's fear of untoward real-world consequences to achieve victories largely ideological necessarily must be another.

B. *Passion and Perspective*

Activist legal scholars face more complications than even Machiavelli's Prince when it comes to constructing an appropriate sense of "civic virtue." The Prince had only to consider the relationship between his public and private moralities. Legal scholars of activist inclination must, in contrast, juggle several distinguishable public moralities—the scholar's, the lawyer's, the citizen's, and the politician's. Thus, to suggest that progressive activist scholars performed less than perfectly during the fall of 1987 is not to say anything very

185. See *supra* note 15.

186. See *Ninth Justice*, *supra* note 8, at xiv–xv ("As long as Judge Kennedy was going to make it [through the confirmation process], there was no need to antagonize him, was there?").

187. See *supra* notes 12, 116.

harsh about them. As philosopher Stuart Hampshire recently has noted, very few people "ever confront Machiavelli's problem in the concrete circumstances of their own lives," and most of us therefore have insufficient recognition of the fact that for "a person of experience" the "usual choice will be of the lesser of two or more evils."¹⁸⁸ Moreover, the moral problem of "many hands"¹⁸⁹—that "I was only showing solidarity with over- (or under-) zealous allies"—complicates the more familiar problem of "dirty" ones for participants in all mass coalition efforts.

Yet, if political life inevitably consists of the struggle "to mobilise the support of other people and to direct their activities towards goals that the power-holder determines," politics is also subject to "relatively feeble constraints" on its practice imposed from the outside.¹⁹⁰ Therefore, as Hannah Arendt has suggested with respect to journalists, even while playing the most conventional version of the "detached" scholarly role, the legal scholar nonetheless may still perform an important political function, precisely *because* that function is being performed from outside the political realm.¹⁹¹ The abstractions and generalities endorsed by Hatch and Tushnet are thus anything but frivolous: by speaking any relatively disinterested version of the truth with respect to public issues, the scholar not actively engaged in constitutional politicking helps to keep the players honest with each other, and honest with themselves. But it is fair to expect something similar even from scholars who do become directly involved. It is not too much to ask that our scholar-politicians at least attempt to be unusually self-conscious, if they cannot be pure; to be honest, to themselves at least, about when they are being manipulative, or self-serving, or just cynical. Just as professional public interest/law reform litigators must confront conflicts between the needs of individual clients and their own social change objectives,¹⁹² so must scholars who engage in mass politics carefully and conscientiously distinguish between personal or scholarly agendas and the interests relevant to their fellow citizens.

In the Bork Affair, many rules concerning accuracy and context were surely stretched, if not broken. But does that make the Bork Affair so different from the rest of our daily lives? Even in our underexamined private lives we know that many of our ethical and moral rules

188. S. Hampshire, *supra* note 161, at 170.

189. D. Thompson, *supra* note 180, at 40–65.

190. Benn, *Private and Public Morality: Clean Living and Dirty Hands*, in *Public and Private in Social Life* 165 (S. Benn & G. Gaus eds. 1983).

191. H. Arendt, *supra* note 163, at 261. Arendt distinguishes technically, but not functionally, between the journalist's obligation (to "suppl[y] information") and that of the scholar (to "tell[] truth"). *Id.* at 260–61.

192. See Luban, *supra* note 183, at 341–57 (discussing the issue of client control); see also Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 *Yale L.J.* 470, 471 (1976) (civil rights lawyers' goal of racial balance can conflict with client-parents' goal of improving education).

are really guidelines only, good for ordinary times, and that sometimes, for good cause, they may have to be transgressed.¹⁹³ And yet, paradoxically, we also are aware that such rules are not, because of one transgression, thereby permanently vacated or annulled.¹⁹⁴ Why should it be any different in our public lives? The abandonment of the detached role, at appropriate "constitutional moments"—for example, to join with interest groups and politicians to oppose a nominee like Robert Bork—need not be addictive. Joining forces with politicians or other outside interests on appropriate occasions need not require blind adherence to all their actions or inactions. Careful decisions about when and whether to conform to the special interests' tactics and short-term desires help ensure that political actions one deems truly necessary are taken without unnecessarily undermining the other basic responsibilities connected with the scholarly role. They heighten our own self-consciousness about the temptation to trade upon public deference to scholarly expertise. And such careful decision making may also serve to heighten the sense of independent scholarly identity—of being responsible "for what may become of [oneself] under the impact of these paradoxes,"¹⁹⁵ furthering and reinforcing a sense of unique responsibility that occasionally bearing the consequences of having been unfashionable can only further sharpen.

Because the problems of dirty hands, paternalism, and self-delusion are inevitable in constitutional and all other sorts of politics, Hampshire has urged potential political actors to conceive of their political morality as a "commitment to a way of life."¹⁹⁶ Because "abstract thinking in the conduct of public affairs" is so unlikely to be useful¹⁹⁷ (and for professional argument-makers like law teachers such a temptation for self-rationalization), Hampshire counsels a deep and principled devotion to "explicit reasoning"¹⁹⁸ regarding public morality. This reasoning, he says, should take place in the most concrete possible terms, before a dubious action is undertaken, or a contem-

193. Cf. Walzer, *Political Action: The Problem of Dirty Hands*, 2 *Phil. & Pub. Aff.* 161, 169–71 (1973). Walzer, like Max Weber, focuses not upon the possibility that Machiavelli was wrong in describing the inevitability of dirty hands, but upon the fact that the "Machiavellian hero has no inwardness" when it comes to the question of having had to get one's hands dirty. *Id.* at 176. Weber sought to resolve this problem by trusting to the individual actor's sense of responsibility and guilt, a sense of trust heavily dependent for its success on the particular politician's "sense of proportion" and degree of "inner concentration and calmness." M. Weber, *Politics as a Vocation* in *From Max Weber* 115, 120 (Gerth & Mills eds. 1946). Walzer emphasizes in addition the need to reaffirm "rules" even after they have—justifiably—been broken. Walzer, *supra*, at 171–72.

194. Walzer, *supra* note 193, at 169–71.

195. M. Weber, *supra* note 193, at 125.

196. S. Hampshire, *Public and Private Morality*, in *Public and Private Morality* 47 (S. Hampshire ed. 1987).

197. *Id.* at 38.

198. *Id.* at 28.

plated one foregone—in order to prevent both “naive and mechanical Machiavellianism” and political self-indulgence.¹⁹⁹

In the context of legal scholarship, different political “rules of engagement,” both ethical and technical, may need to be derived to suit different occasions and political roles. A popular book designed to build a long-term “republican” community should be judged by different standards than those applied to actions taken in the course of high-pressure efforts to halt particular nominations or to achieve some other short-term goal. A compromise in the hands-off “truth-telling” political function may be far more appropriate in one situation than in the other. Explicit moral reasoning should also be applied to the decision whether to add one’s name—out of an abstract, possibly sentimental sense of collegial solidarity—to an amicus brief on a complex and controversial issue, whose text has not personally been seen, written by persons whose exact views one does not know; or to the decision whether to sign petitions and advertisements containing the disclaimer that one’s institutional affiliation is included for “identification purposes only,” as if this were not a sly attempt to invoke professorial authority at the same time as disclaiming it. There may be unpleasant issues to consider, too, in deciding whether to participate in a demonstration whose special interest organizers have informed the media that their goal is to pressure the Supreme Court with respect to its decision in a pending case, suggesting that they wish *Cooper v. Aaron*²⁰⁰ had been decided differently just because, for once, they happen to possess a real claim to majority support.

Such explicit reasoning must be concrete in another sense as well. It must include the question of the real-world consequences of following a separate course. And here perhaps the scales should be just a little tilted against automatic self-association with politicians and the interest groups, as a protection against the impulse always to join in anything that might advance one’s abstract values. The costs of saying no—or (probably more wisely) nothing—when such conformity is sought almost always will be smaller in concrete political terms than the cost to scholarly identity of an overly hasty “yes.” Vanity, Max Weber said, has always been the scholars’ “occupational disease”²⁰¹; perhaps, therefore, their special preventive medicine should consist in being particularly careful not to exaggerate their individual political importance. Would that march actually be cancelled, or the brief or advertisement given up if “I” do not participate? Would the Republic fall, or, even in the smallest private way, the “republic” rise? The Burger Court may not have thought that teachers serve as role models,²⁰² but

199. *Id.* at 51.

200. 358 U.S. 1 (1958) (per curiam) (no degree of popular resistance justifies non-enforcement of school desegregation order).

201. M. Weber, *supra* note 193, at 116.

202. *Cf. Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (goal of providing

on that point surely most "republicans" believe the Burger Court was wrong. We should not overestimate the loss the interest groups will suffer if on some particular occasion we do not conform, or underestimate the other long-term benefits that may accrue.

It is psychologically and politically naive, of course, to think that the considerations given such harsh voice by Saul Alinsky—that one's ethical standards regarding means and ends questions depend upon how much one cares about the underlying issue, that evaluating the suitability of a certain means depends upon the availability and comparative effectiveness of less offensive alternatives²⁰³—will not necessarily be part of such reflections. It would be equally naive to think that excellence in many types of legal scholarship requires that one be interested in contemporary politics at all. And it is also crude, and wrong, to think that collegial opinion should have no weight, or to fail to recognize that an excessive preoccupation with motive can itself be perilous when prompt action is required.²⁰⁴ Still, how and when "citizenship" trumps "lawyer"—and one may add here scholar, or activist, or both—"as a source of desirable identity,"²⁰⁵ is a central, not peripheral question. If candor should "hardly ever" be departed from in public life,²⁰⁶ that does not mean that, when it is, the departure should be accompanied by self-delusion. Distinguishing frequently and hard-headedly between commitment and conformity, between intellectual and political commitments, in the end will almost certainly enhance and deepen legal scholarship as well. One of the more valuable educative functions of political engagement is precisely the opportunity it affords for further concrete thinking. The occasional loss of "seemliness" that political engagement may involve therefore can become genuinely worthwhile even in the most traditional scholarly terms.

For the legal scholar contemplating all these tensions, a crucial cautionary figure necessarily is Felix Frankfurter: historically pivotal and morally paradigmatic; revered by anti-Bork agitators for his life before his appointment to the Court, and by pro-Bork agitators for his behavior after it. In all his dealings with Capitol Hill and with the President in constructing the New Deal, striking bargains and making promises, Frankfurter almost surely acquired rather dirty hands. From his professorial perch, moreover, he also was a prolific independent advocate and propagandist: for Sacco and Vanzetti; for Zionism; for civil rights and liberties; for labor organizers; and for candidates for public

role models for minority students does not supersede nonminority teachers' equal protection rights).

203. S. Alinsky, *supra* note 76, at 26, 32.

204. Cf. R. Niebuhr, *Moral Man in Immoral Society* 74 (1932) (moral perfectionism does not always lead to ideal social consequences).

205. S. Levinson, *supra* note 168, at 167.

206. Shapiro, *supra* note 163, at 750.

office, national and local. And yet, in the last acknowledged historically critical "constitutional moment" before Bork—in 1937, when his friend and patron Franklin Roosevelt attempted to pack the Court—Professor Frankfurter was suddenly, conspicuously silent. Feigning neutrality in public, behind the scenes he "copiously and energetically"²⁰⁷ helped Roosevelt to advance a plan that could have permanently destroyed the judicial independence Frankfurter so worshipped—with the strong intimation of a future Court appointment as a Presidential *quid pro quo* for his support.²⁰⁸ And then, although it seems almost impossible to believe, he actually *testified* at his own 1939 confirmation hearings that he had "not expressed an opinion" on the President's Court proposals: "I have found generally that as a law teacher," he said, "I can be more helpful by drawing people's attention to relevant considerations which should guide them in reaching their own conclusions than by attempting to influence them by mine,"²⁰⁹ thereby both lying and cynically abusing the traditional apolitical "scholarly" public image for his own gain. There may be no easy way to distinguish amoral calculation from responsible "republican" or democratic "judgment,"²¹⁰ or to distinguish self-rationalizing opportunism from "civic virtue." But, in considering the values that should inform our own behavior in the constitutional politics of the future, we may wish to consider whether anyone, Right or Left, could think that Professor Frankfurter properly fulfilled the scholar's function then.

If we expect the quality of judgment in our judges—and if Bork was rightly faulted for so having lacked it—why should we not expect it from our scholars too? And, if so, why do we not hear more about it?²¹¹ Several years ago, Joseph William Singer incurred the wrath of legal scholars far and near for daring to suggest, in the highest tradition of moral courage and scrupulous scholarly forthrightness, that moral choices in academic discourse were like moral choices elsewhere.²¹²

207. Roosevelt and Frankfurter, *Their Correspondence 1928-1945*, at 14 (M. Freedman ed. 1967).

208. *Id.* at 372.

209. *Id.* at 15 (quoting from Frankfurter's Senate Judiciary Committee testimony). Just to make assessing this exceedingly complex man more difficult still, we are told that this apparent duplicity was only brought to light by virtue of Frankfurter's direct order that it be done, apparently out of a commitment to candor, at least with respect to history. *Id.* at 372.

210. H. Arendt, *supra* note 163, at 37-39.

211. Cf. J. Beiner, *supra* note 161. Arguing for a stance combining "sympathy and detachment," *id.* at 102-28, Beiner defines such judgment as "[t]he weighing of given particulars and their careful adjustment to the demands of an elusive universal—a universal under which the particular cannot be neatly subsumed." *Id.* at 112; see also B. Barber, *The Conquest of Politics: Liberal Philosophy in Democratic Times* 206 (1988) ("[T]he real political problem is one of action under conditions of uncertainty, not one of truth or even justice in the abstract.").

212. Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 *Yale L.J.* 1, 5 (1984).

Surely in the present, more conventionally political context, such bizarre iconoclasm should not be controversial.

There could hardly be a formula to tell the scholar-activist when ours should be a government "of the people, by the people"—and when it should be merely "for" them. To speak or to stay silent, to form alliances or to stay separate, to correct one's allies' helpful errors or quietly to reap their pleasant consequences, to work with others and still to preserve a separate scholarly identity—the absence of a formula to resolve problems such as these only means that our moral lives as scholar-citizens will inevitably be harder than we would desire.

CONCLUSION

Perhaps the greatest irony of the Bork Affair is the extent to which all of those most directly involved somehow profited. The liberal Senators and interest groups publicly humiliated Meese and Reagan, and effectively energized their troops for the following year's election. The law professors saw what many of them regarded as "an alien and unattractive theory of our Constitution [put] to rest"²¹³—and in a way that the Souter nomination suggests may well be quasi-permanent. The Right obtained a reliable Court majority on virtually all the genuinely contested constitutional issues—and was denied that majority with respect to abortion only because, with Kennedy, as would have been true with Bork, one more vote was still required. And Robert Bork achieved full political martyrdom—as well as a national best-seller.

In the end, the behavior of the law professors opposed to Bork, during and after the Affair, for all of the criticism (and self-criticism) implied and set forth here, probably is the most defensible. Activist legal scholars mobilized to oppose a nominee whose approach to constitutional adjudication they found not merely undesirable, but dangerous. They came out in force to oppose someone whose theories, not just whose values, they found pernicious. Theory was, after all, their only uniquely professorial area of competence and concern, and Bork himself had argued that theory was of direct practical importance.

Yet still a bad taste lingers. The people were not activated against Bork based upon his theories; the people reacted against Bork for what they were given to believe would be his nomination's immediate social consequences. If the progressive scholar-citizens acquiesced in the excesses of the Bork campaign, and largely disappeared when Kennedy came upon the scene, it is not a complete answer to suggest that Kennedy's methodology presented less of a long-term intellectual or ideological threat than Bork's. It is not unfair to ask how much care legal scholars took in 1987 to make sure that our less "expert" fellow

213. Dworkin, *From Bork to Kennedy*, *supra* note 103, at 42.

citizens also understood the “facts amidst appearances”²¹⁴ during the Supreme Court appointment controversies of that year.

214. R. Emerson, *The American Scholar*, in *The Selected Writings of Ralph Waldo Emerson* 55 (Mod. Lib. ed. 1940).

